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Beyond Unreasonable

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ABSTRACT

The concept of "reasonableness" permeates the law: the "reasonable person" determines the outcome of torts and contracts disputes, the criminal burden of proof requires factfinders to reach conclusions "beyond a reasonable doubt," and claims of self-defense succeed or fail on reasonableness determinations. But as any first-year law student can attest, the line between reasonable and unreasonable is not always clear. Nor is that the only ambiguity. In the realm of the unreasonable, many of us intuit that some actions are not only unreasonable but beyond the pale—we might say they are beyond unreasonable. Playing football, summiting Nanga Parbat, and attempting Russian roulette all risk serious injury or death, but most people do not view them the same. These distinctions raise vexing questions: What is it that makes us feel differently about these activities? Mere unfamiliarity? Moral condemnation? Relative utility? Or something else altogether? Moreover, who exactly is the "we" forming these judgments?

This Article explores the vague lines that separate our sense of reasonable, unreasonable, and beyond unreasonable—the reasonableness lines. Part II examines the general characteristics of these lines. Part III explores their significance in law, and Part IV considers their application in four discrete areas of law: tax policy for medical expenses, criminal punishment, speech restrictions, and tort liability for inherently dangerous sports. The Article ends by summarizing the implications of the reasonableness lines for our culture and for ourselves.

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TABLE OF CONTENTS

I. Introduction 376
II. The Reasonableness Lines 378
III. The Reasonableness Lines in Law 387
IV. Applications 396
A. Unreasonableness in Tax Policy 396
B. Unreasonableness in Criminal Punishment 401
C. Unreasonableness in Speech Restrictions 405
D. Unreasonableness in Contact Sports 409
V. Conclusion 417

I. INTRODUCTION

The concept of "reasonableness" permeates the law: the "reasonable person" determines the outcome of torts and contracts disputes,[1] the criminal burden of proof requires factfinders to reach conclusions "beyond a reasonable doubt,"[2] and claims of self-defense succeed or fail on reasonableness determinations.[3] But as any first-year law student can attest, the line between reasonable and unreasonable is not always clear. Nor is that the only ambiguity.[4] In the realm of the unreasonable, many of us intuit that some actions are not only unreasonable but beyond the pale.

Consider Russian roulette. The odds of dying while playing Russian roulette are around 17%,[5] about the same as the odds of dying while summiting Nanga Parbat in the Himalayas.[6] Most of us find both risks uncomfortably high. Yet on closer reflection, the two risks

1. *See infra* Part II.
2. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 40–43 (10th ed. 2017).
3. *See infra* notes 69-73 and accompanying text.
4. There is also the risk of making category mistakes by conflating terms of art across different domains. *See* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."). This Article explores general intuitions underlying the concept of reasonableness rather than attempting to parse the differences between the word used in different legal contexts.
5. Assuming a six-chamber revolver. *See* Eric W. Weisstein, *Russian Roulette*, WOLFRAM MATHWORLD, http://mathworld.wolfram.com/RussianRoulette.html [https://perma.unl.edu/GK4S-M47K] (last updated June 24, 2020).
6. With a 20% death rate (the ratio of deaths of all climbers who were hoping to summit and who went above base camp), attempting to summit the Himalayan peak Nanga Parbat (colloquially known as "Killer Mountain") is in some ways even riskier than Russian roulette. *See* Ben Butcher, *How Deadly Is Mount Everest?*, BBC (Mar. 21, 2019), https://www.bbc.com/news/world-47418215 [https://perma.unl.edu/R7ML-FWMQ]. Nanga Parbat is one of fourteen mountains with summits above 8,000 meters. *Id.* The death rate for these fourteen mountains

feel different to many of us. Few people want to climb high in the Himalayas, but those who do are not typically castigated for their choices.[7] Most of us do not extend the same charitable understanding to the person playing Russian roulette. We might find both of these activities inherently dangerous, but we do not think about them in the same way. Even if both are in a sense unreasonable, pointing a loaded gun at your head and pulling the trigger seems different than climbing a dangerous mountain. We might think of Russian roulette as *beyond unreasonable*, in contrast to the merely *unreasonable* sport of extreme mountain climbing.

Why do many of us find extreme mountain climbing unreasonable but view as reasonable other recreational activities which also have a nontrivial risk of death or serious injury, like football? What exactly is "it" that makes us feel differently about these activities? Is it unfamiliarity? Moral condemnation? Relative utility? Or something else altogether? And who exactly is the "we" who forms these judgments?[8]

This Article explores the vague lines that separate our sense of reasonable, unreasonable, and beyond unreasonable, or what I call "the reasonableness lines." Part II examines the general characteristics of the reasonableness lines. Part III explores their significance in law, and Part IV considers their application in four areas of law: tax policy for medical expenses, criminal punishment, speech restrictions, and tort liability for inherently dangerous sports. The Article ends by summarizing three implications of the reasonableness lines. First, they are socially constructed lines that illustrate the permeability between law, politics, and culture. Second, they ask individual citizens to identify with a larger community that pushes wholly subjective beliefs and experiences into less subjective frames. Third, their communal framing reveals something of our social ordering and cautions against rigid distinctions between what we find reasonable, unreasonable, and beyond unreasonable.

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ranges from around 2% to 30%. *Id.* According to one estimate, Nanga Parbat has had 339 successful ascents to the summit and 69 deaths. *Id.*

7. But see Julia Hollingsworth, *Everest Traffic Jam Creates Lethal Conditions for Climbers*, CNN (May 24, 2019, 10:29 AM), https://www.cnn.com/2019/05/24/asia/everest-climbers-intl/index.html [https://perma.unl.edu/HJ3B-ZD5W], for a discussion of the recent controversy about inexperienced climbers on Everest.

8. I adopt this first-person plural pronoun throughout this Article to describe broader social views and judgments. Part of the challenge of any socially constructed notion of reasonableness is that voices ignored, overlooked, or otherwise marginalized by the relevant community might rightly reject the terms by which the community has established its norms. While I recognize these same limitations constrain my use of the first-person plural pronoun, I attempt to limit my use of the convention to relatively uncontroversial descriptions. The critical reader might substitute something like "the vast majority of Americans" for my use of the first-person plural pronoun—I mean for those descriptions to be interchangeable in this Article.

II. THE REASONABLENESS LINES

The reasonableness lines are social and moral judgments. They are social because they can only be defined by a community of people. To put this differently, my subjective beliefs cannot by themselves determine reasonableness. It might turn out that my beliefs align with the sense of reasonable of the community in which I find myself. Or I may have beliefs that are outliers relative to that community. But I will not know the reasonableness of my own subjective beliefs apart from the community that judges those beliefs.

These social judgments about reasonableness sometimes change. A hundred years ago, it would have been beyond unreasonable to suggest that two men should be allowed to marry each other. Today, same-sex marriage is permissible, and it is also considered reasonable by a majority of Americans.[9] We could make similar observations (using different time spans) about arguments for cohabitation, marijuana use, and many gender norms. Conversely, a hundred years ago, arguments supporting Jim Crow would have been reasonable to many white Americans. Today, these arguments are beyond unreasonable to almost everyone.[10] It is entirely possible, and probably likely, that our descendants a hundred years from now will have other examples of the shifting lines of reasonableness. As Jeffrey Stout has argued, the context that justifies our current beliefs could change: "It is perfectly conceivable that we will someday be justified in deviating significantly from the beliefs we are currently justified in believing."[11]

At the same time, not all of our views seem open to change. For example, arguments for ritual child sacrifice have always been beyond unreasonable in the United States—an example of what Stout calls an "underlying social agreement."[12] This limitation on ritual child sacri-

9. Based on data from Pew Research Center, 61% of Americans support same-sex marriage, while 31% oppose it. *Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.unl.edu/7RAG-4PCV]. This is almost the direct inverse of data from 2004, where 60% of Americans opposed same-sex marriage and 31% supported it. *Id.* This example shows how quickly an idea can shift from unreasonable to reasonable.

10. *But see* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1 (2012) ("The arguments and rationalizations that have been trotted out in support of racial exclusion and discrimination in its various forms have changed and evolved, but the outcome has remained largely the same. An extraordinary percentage of black men in the United States are legally barred from voting today, just as they have been throughout most of American history.").

11. JEFFREY STOUT, DEMOCRACY AND TRADITION 233 (2004). Because our justifications are warranted in our context, "it would be foolish to address our justifications to the audience of *all* rational agents, regardless of time or place." *Id.* at 236. Stout argues this is humility, not skepticism. *Id.* at 233.

12. *Id.* at 277.

fice also illustrates why no society is ever fully pluralistic: every society sets limits on its acceptable differences.[13]

The reasonableness lines are moral judgments that differ from objective assessments. We can illustrate the difference between reasonableness and objectivity by considering the "reasonable person" in law. This standard prevents an individual from relying upon a wholly subjective sense of harm, fear, duty, or care; the reasonableness of my actions is not simply whatever I think is reasonable, it is also a social judgment that incorporates the views of other people. For example, I will not succeed in a defense involving the use of deadly force simply because I actually feared for my life. My subjective fear is a necessary but not sufficient element of self-defense: I must have actually been in fear, and my fear also must have been reasonable.

This less subjective assessment is not an objective assessment. Consider the "reasonable man" standard that preceded today's "reasonable person." Susan Estrich observes that the earlier standard's neglect of gender differences required a woman who was violently sexually assaulted to resist her assailant in every way possible:

> In a very real sense, the "reasonable" woman under [this] view . . . is not a woman at all. [This] version of a reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy "sissy." She is a real man.[14]

Today's reasonable person improves upon the reasonable man standard but continues to elide important differences pertaining to culture, physical stature, and other characteristics.[15] For example, in at least some circumstances, as when an assailant is running toward someone with a non-deadly weapon, the reasonableness of the response of a frail old woman will be judged differently than that of a strong young man. These differences are intuitive to most people. And

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13. These limits vary and have varied across societies, which is one reason why empirical appeals to universal human rights are generally unpersuasive. *See* NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 325 (2008) ("It is impossible to develop a secular account of human dignity adequate for grounding human rights. Or to speak more cautiously: given that, after many attempts, no one has succeeded in developing such an account, it seems unlikely that it can be done."); *see also* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11 (rev. ed. 2000) ("There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred . . . ."); MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 16 (2006) ("[W]hat ground one who is not a religious believer can give for the claim that every human being has inherent dignity is obscure.").

14. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1114 (1986).

15. *See, e.g.*, ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 187 (2004) (noting shortcomings of the "reasonable person" standard for people from non-Western cultures); Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435 (2010) (noting the complexities of the "reasonable person" standard).

yet, there is also a darker side of the subjectivity of reasonableness when we consider whether there is such a thing as a "reasonable racist."[16] These tensions highlight the impossibility of establishing an "objective" reasonable person: there is always a tradeoff between generalizing assumptions and recognizing individual characteristics.

Nor is reasonableness the same as objective truth. A reasonable belief or action may in fact be ontologically or theologically correct, or it may simply appear to be correct in a given epistemic context.[17] Relatedly, the reasonableness lines do not by themselves establish or imply moral differences or similarities between reasonable or unreasonable beliefs or acts. I may think that efficient breach of a contract and the use of deadly force in self-defense are both reasonable, but that does not mean I assign to them the same moral significance. Similarly, I may find both the Russian roulette player and the Nanga Parbat climber to be beyond unreasonable, but that does not mean I equate the harm of their actions.

Because reasonableness is a moral concept, it also differs from rationality.[18] Determining the reasonableness of a belief or action usually draws upon moral frameworks, while assessing the rationality of a belief or action relies upon the internal logic of a belief or the coherence of the justification of an action.[19] The philosopher John Rawls, following Kant, drew a similar distinction in a section of *Political Liberalism* titled "The Reasonable and the Rational."[20] Rawls pointed to an example from everyday language: "We say: 'Their proposal was perfectly rational given their strong bargaining position, but it was

16. A well-known example is New York City subway vigilante Bernhard Goetz's argument that he reasonably feared for his life when he shot four unarmed Black teenagers. *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1990).

17. This Article makes no ontological or theological claims about the reasonableness lines but neither does it preclude the existence of transcendent truths of "good" and "bad" that exist independently of contingent legal, political, or cultural discourses.

18. *See* Polycarp Ikuenobe, *Rationality, Practical Reasonableness, and the Social and Moral Foundation of a Legal System*, 32 J. SOC. PHIL. 245, 260 (2001) ("Reasonableness is not equivalent to morality, but reasonableness implies morality, and rationality does not . . . ."); REASONABLENESS AND LAW, at xii (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009) ("[R]easonableness draws on moral considerations . . . and cannot be reduced to correctness of reasoning or to instrumental rationality."). *But see* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 10–11 (2004) (arguing that irrational is itself slippery, potentially meaning "devoid of thought" or "bad thought in some normative sense" (emphasis omitted)).

19. *See* Ikuenobe, *supra* note 18.

20. JOHN RAWLS, POLITICAL LIBERALISM 48–54 (1993) ("In justice as fairness the reasonable and the rational are taken as two distinct and independent basic ideas."). Rawls credits Kant with one of the earliest distinctions between these two terms. *Id.* at 48 n.1.

nevertheless highly unreasonable, even outrageous.'"[21] In other words, the analytical soundness of a conclusion that follows from a given premise tells us little about whether the conclusion is morally sound or normatively good.[22] Peter Singer's defense of infanticide may be entirely rational given his premises.[23] But many people still find his premises highly unreasonable.[24] The rational coherence of a syllogism does not allow us to assess the normative reasonableness of its conclusion.[25]

Of course, rationality is not itself fully detached from broader moral frameworks. Rawls warned against some moral philosophers who "think the rational is more basic" and who suggest that "the reasonable can be derived from the rational."[26] He rejected these assertions, arguing instead that reasonableness and rationality both connect to "a sense of justice and the capacity for a conception of the good . . . taking into account the kind of social cooperation in question, the nature of the parties and their standing with respect to one an-

21. *Id.* at 48.

22. *See id.* at 50 ("The rational . . . applies to a single, unified agent (either an individual or corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly its own. The rational applies to how these ends and interests are adopted and affirmed, as well as to how they are given priority. It also applies to the choice of means, in which case it is guided by such familiar principles as: to adopt the most effective means to ends, or to select the more probable alternative, other things equal.").

23. *See, e.g.*, PETER SINGER, PRACTICAL ETHICS 12–14 (3d ed. 2011) (endorsing preference utilitarianism over hedonistic utilitarianism, meaning the utilitarian calculus should consider whether the number of preferences is maximized as opposed to the net gain in pleasure); *id.* at 153–54 (defending the practice of infanticide).

24. *E.g.*, Kevin Toolis, *The Most Dangerous Man in the World*, GUARDIAN (Nov. 5, 1999, 7:59 PM), https://www.theguardian.com/lifeandstyle/1999/nov/06/weekend.kevintoolis [https://perma.unl.edu/4ULE-6S58] (describing some of the reactions to Singer's claims).

25. RAWLS, *supra* note 20, at 51. Rawls situated his contrast between rationality and reasonableness within the "justice as fairness" framework of his own political theory. *Id.* ("What rational agents lack is the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse."). He also believed that the lack of moral framework does not mean that rationality is either limited to means-ends reasoning or to considerations of self-interest. *Id.* at 50–51 ("[R]ational agents are not limited to means-ends reasoning, as they may balance final ends by their significance for their plan of life as a whole, and by how well these ends cohere with and complement one another. Nor are rational agents as such solely self-interested: that is, their interests are not always interests in benefits to themselves. Every interest is an interest of a self (agent), but not every interest is in benefits to the self that has it. Indeed, rational agents may have all kinds of affections for persons and attachments to communities and places, including love of country and of nature; and they may select and order their ends in various ways.").

26. *Id.* at 51.

other."[27] The philosopher Alasdair MacIntyre has similarly argued that rationality, like reasonableness, depends upon underlying tradition-bound assumptions and beliefs about what makes a particular kind of discourse logical or coherent.[28] This recognition that both reasonableness and rationality draw upon social influences helps to show why neither of these concepts can lay claim to pure objectivity.[29]

That said, some forms of rationality are more culturally embedded than others. We would consider the person who believes that two plus two equals four to be rational and the person who thinks otherwise to be irrational. But not all forms of rationality are so undisputed. For example, people sometimes appeal to "rational" argument to gain the upper hand in a contentious debate or to imply that an opposing view is "irrational."[30] Some political theorists make a similar move with Rawls's concept of "public reason," suggesting that we can distinguish between arguments acceptable to public discourse and those that cannot be justified with commonly accessible premises.[31] These appeals

27. *Id.* at 52.

28. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 222 (3d ed. 2007) ("[A]ll reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition; this is as true of modern physics as of medieval logic. Moreover when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose."); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 350 (1988) ("There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other.").

29. *See* Chad Flanders, *The Mutability of Public Reason*, 25 RATIO JURIS 180, 200–02 (2012) (suggesting that cultural and social forces can generate new forms of reasoning); Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459, 1481 (1996) (describing how "novel political arguments" could over time "become part of the public political culture").

30. *See, e.g.*, Jennifer Lackey, *The Irrationality of Natural Life Sentences*, N.Y. TIMES: OPINIONATOR (Feb. 1, 2016, 3:21 AM), https://opinionator.blogs.nytimes.com/2016/02/01/the-irrationality-of-natural-life-sentences/ [https://perma.unl.edu/FUA3-ZQH7]; The Editorial Bd., *Trump's Irrational Border Plan*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/opinion/trumps-national-guard-border.html [https://perma.unl.edu/2Q23-2B6M] ("Such a move has at best a tenuous basis in law and none in logic, and it will burn through federal funds better spent elsewhere."). For an argument that one's political opponents are not irrational, see Gary Gutting, *Are Your Political Opponents Crazy?*, N.Y. TIMES: OPINIONATOR (Aug. 2, 2011, 3:57 PM), https://opinionator.blogs.nytimes.com/2011/08/02/are-your-political-opponents-crazy/ [https://perma.unl.edu/7ERZ-RNXE] (listing examples like John McCain calling opponents of the debt-limit increase "worse than foolish" and Paul Krugman suggesting that President Obama's desire to compromise might be "obsessive and compulsive").

31. For a collection of the best known arguments for and against this use of Rawls's public reason argument, see THE ETHICS OF CITIZENSHIP: LIBERAL DEMOCRACY AND RELIGIOUS CONVICTIONS (J. Caleb Clanton ed., 2009).

to a common rationality ignore the ways in which we all are committed to particular beliefs that we cannot prove.[32]

As a practical matter, most of us live in an uneasy tension when it comes to rationality. We accept many "common sense" observations at face value: few of us could get by in the world if we rejected the assertions of rationality underlying mathematical arguments. At the same time, few of us are comfortable accepting every claim of "objective" rationality, particularly when those claims are exacerbated or misused by partisans. In other words, most of us are neither nihilists nor naifs. But we often disagree about those things which we ought to accept at face value and those toward which we ought to express skepticism.[33]

As the preceding discussion suggests, the reasonableness lines connect not only to law (where they often but not always determine legality) but also to politics and culture. In law, the reasonableness lines factor into judgments about permissible and impermissible activities. Reasonable actions are often (but not always) permissible and unreasonable actions are often (but not always) impermissible. In politics and culture, which lack the overt coercive force of law, reasonableness affects judgments about acceptable and unacceptable beliefs and ac-

32. *See* LESSLIE NEWBIGIN, PROPER CONFIDENCE: FAITH, DOUBT, AND CERTAINTY IN CHRISTIAN DISCIPLESHIP 24 (1995) ("So long as we continue to live we continually act on the assumption that certain things are true and others not.").

33. The global pandemic that hit the United States in 2020 led to numerous examples of contested claims about what science and evidence required or did not require with respect to public health measures. *See, e.g.*, Jennifer Frey, *Political Wisdom and the Limits of Expertise*, BREAKING GROUND (July 2, 2020), https://breakingground.us/political-wisdom-and-the-limits-of-expertise/ [https://perma.unl.edu/36N6-TFCU] (discussing conflicting guidance from public health experts as to the safety of attending protests). The 2019 impeachment of Donald Trump provides another example. *Compare* The Editorial Bd., *Trump Has Been Impeached. Republicans Are Following Him Down*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/opinion/trump-impeachment-vote.html [https://perma.unl.edu/EPK3-6ELR] ("By any reasonable measure, Mr. Trump's own conduct in office clears the bar for impeachment set by the founders. The case against him is that he solicited foreign interference to help in his 2020 reelection campaign, that he used hundreds of millions of taxpayer dollars to do it, that his administration tried to hide the evidence and that he then blocked Congress from performing its constitutionally mandated role of checking the executive branch. Multiple government officials, some appointed by the president himself, have confirmed all of these facts."), *with House Democrats Impeach Trump, Pelosi Floats Holding Up Senate Trial*, FOX NEWS (Dec. 19, 2019), https://www.foxnews.com/us/house-democrats-impeach-trump-pelosi-senate-trial [https://perma.unl.edu/86JC-44LD] ("Without any Republican support, the House on Wednesday night voted to impeach President Trump for 'abuse of power' and 'obstruction of Congress' related to his dealings with Ukraine, making Trump the third American president ever to be impeached. The separate votes on the two counts teed up an all-but-certain acquittal in the Senate, should House Democrats forward the charges to the GOP-controlled chamber. They also fulfilled a promise made by some Democrats ever since Trump's inauguration to impeach him, even as polls have shown a decline in public support for the action.").

tivities. Reasonable arguments are usually more persuasive than unreasonable ones, and arguments that are beyond unreasonable often (but not always) encounter a level of social disapproval that places them outside of the boundaries of polite society.[34] Notions of reasonableness in one of these domains can also influence notions of reasonableness in another: law does not always follow culture any more than culture always follows law, but contested notions of reasonableness in each of these domains spill over into the other.[35]

The reasonableness lines are usually more fluid in politics than they are in law.[36] One reason for this greater dynamism in politics is that law usually depends upon administrable and enforceable standards. In contrast, political discourse is often more exploratory, and its reasonableness lines often more contested. This is particularly the case for issues on which there is widespread disagreement. Today, for example, millions of Americans support total bans on abortion, and millions of Americans advocate for complete integration of transgender athletes in all levels of women's sports.[37] Yet in both examples, millions of other Americans see no plausible argument for embracing these policy suggestions as law.[38] These widespread disagreements

34. *See generally* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963) (describing the effects of stigmatizing an individual "from a whole and usual person to a tainted, discounted one").

35. A number of scholars have noted the complicated relationship between law and culture. *See, e.g.*, Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841 (2011) (comparing the "historical school" which sees law as a product of culture with the "constitutive approach" which sees law as creating culture); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 487 (2003) ("[L]aw does not merely enforce antecedent cultural norms.").

36. *See* Maggie Astor, *How the Politically Unthinkable Can Become Mainstream*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/us/politics/overton-window-democrats.html [https://perma.unl.edu/JD9K-R4VL] (citing examples of changing policy preferences like Medicare for all, 70% top tax rate, and abolishing Immigration and Customs Enforcement); Tom Perriello & Felicia Wong, *Bold Versus Old*, DEMOCRACY (May 18, 2018, 1:39 PM), https://.org/arguments/bold-versus-old/ [https://perma.unl.edu/W8UH-SEVS] (citing examples like criminal justice reform, free community college, $15 minimum wage, and privacy rights).

37. *See* PRRI Staff, *The State of Abortion and Contraception Attitudes in All 50 States*, PRRI (Aug. 13, 2019), https://www.prri.org/research/legal-in-most-cases-the-impact-of-the-abortion-debate-in-2019-america [https://perma.unl.edu/XXS5-AVDX] (15% of Americans said abortion should be illegal in all cases); *Most Oppose Transgender Athletes on Opposite Sex Teams*, RASMUSSEN REP. (June 4, 2019), https://www.rasmussenreports.com/public_content/lifestyle/social_issues/most_oppose_transgender_athletes_on_opposite_sex_teams [https://perma.unl.edu/8952-ZK4E] (28% of American adults favor allowing transgender students to participate on the sports team of the gender with which they identify).

38. *See* PRRI Staff, *supra* note 37 (21% of Americans believe that abortion should be legal in all cases); *Most Oppose Transgender Athletes on Opposite Sex Teams*, *supra* note 37 (54% of American adults oppose integration of transgender athletes).

prevent either side from effectively casting the other as politically beyond unreasonable despite rhetorical efforts to that effect, as when anti-abortion advocates call their opponents "baby killers" or transgender advocates say that their opponents are "denying our humanity."[39]

Political reasonableness usually requires ideas to gain some degree of salience with a critical mass of voters.[40] In some cases, politicians restrain their discourse for tactical or strategic reasons, as when President Barack Obama muted his support for gay marriage in 2008,[41] or when Vice President Joe Biden struggled to determine his position on the Hyde Amendment (restricting federal funding for abortion) in

39. *See* Chris Cameron, *Trump Repeats a False Claim That Doctors 'Execute' Newborns*, N.Y. TIMES (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/us/politics/trump-abortion-fact-check.html [https://perma.unl.edu/3ULW-87RB] (describing President Trump's comments at a rally that "the doctor and the mother determine whether or not they will execute the baby"); Erin Allday, *'Denying Our Very Humanity:' Trump Proposal Wounds Bay Area Transgender Community*, S.F. CHRON. (Oct. 30, 2018, 5:46 PM), https://www.sfchronicle.com/health/article/Denying-our-very-humanity-Trump-proposal-13346647.php [https://perma.unl.edu/3C7N-H6FZ]; *see also* Alexandra Desanctis, *Gillibrand Compares Being Pro-Life to Being Racist*, NAT'L REV. (June 11, 2019, 1:58 PM), https://www.nationalreview.com/corner/kirsten-gillibrand-compares-being-pro-life-to-being-racist/ (New York senator and Democratic presidential candidate Kirsten Gillibrand comparing anti-abortion views to racism). The lack of political consensus over what is deemed beyond unreasonable will not prevent individuals from concluding on an interpersonal level that certain groups or other individuals are beyond unreasonable. Issues like abortion and transgender rights remain politically contested but some individuals on both sides of these issues find themselves unable to engage with the other side.

40. One model for understanding fluidity in politics is the "Overton Window," a concept first introduced in the 1990s by Joseph P. Overton, an executive at the Mackinac Center for Public Policy. *See* Astor, *supra* note 36. The concept contends that:

> [P]oliticians are limited in what policy ideas they can support—they generally only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window. Other policy ideas exist, but politicians risk losing popular support if they champion these ideas. These policies lie outside the Overton Window.

The Overton Window, MACKINAC CTR. FOR PUB. POL'Y, https://www.mackinac.org/OvertonWindow [https://perma.unl.edu/VNY9-XHEJ] (last visited Dec. 19, 2019). The key insight of the Overton Window is that shifts normally begin with the public; generally, "the window moves based on a . . . complex and dynamic phenomenon, one that is not easily controlled from on high: the slow evolution of societal values and norms." *Id.*

41. Obama expressed support of legalizing same-sex marriage as early as 1996 but asserted in 2008 that he believed "marriage is the union between a man and a woman." Zeke J. Miller, *Axelrod: Obama Misled Nation When He Opposed Gay Marriage in 2008*, TIME (Feb. 10, 2015, 6:54 AM), https://time.com/3702584/gay-marriage-axelrod-obama/ [https://perma.unl.edu/N2KH-KWDM]. His political strategist David Axelrod advised him to conceal his support of same-sex marriage for political reasons. *Id.*

2019.[42] Yet even these examples reveal the different ways that politically motivated constraints on political discourse negotiate the reasonableness lines: in 2008, Obama would have been out in front of many national political figures had he supported gay marriage;[43] in 2019, Biden was the sole holdout among major Democratic candidates in his continued support of the Hyde Amendment.[44] Obama's shift would have been seen as more unreasonable in 2008 than Biden's shift in 2019.

Sometimes politics prevents law from adopting policies viewed as reasonable. Take court reform, for example. Most Americans believe that fixed terms rather than life appointments are reasonable for Supreme Court Justices.[45] Yet political dynamics and pressures have precluded serious consideration of such a court reform plan.[46] Or consider gun control. Almost all Americans support requiring background checks for gun sales.[47] But despite years of support, legislation requiring universal background checks has never passed, likely due to political divisions.[48]

The final domain of culture permits more unrestrained discourse, especially in isolated circles. For this reason, even though political dis-

42. *See* Maggie Astor, *Joe Biden on Abortion and the Hyde Amendment*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/joe-biden-abortion-hyde-amendment.html [https://perma.unl.edu/QZ4K-2Q2R]; Katie Glueck, *Joe Biden Denounces Hyde Amendment, Reversing His Position*, N.Y. TIMES (June 6, 2019), https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html [https://perma.unl.edu/5HDV-TF2R].

43. Andrew Jacobs, *For Gay Democrats, a Primary Where Rights Are Not an Issue, This Time*, N.Y. TIMES (Jan. 28, 2008), https://www.nytimes.com/2008/01/28/us//28gay.html [https://perma.unl.edu/J35D-H6ES] (noting that, during the 2008 primary, "many gay leaders said they are unhappy that none of the Democrats have embraced the cause of gay marriage").

44. Katie Glueck, *Biden Still Backs Hyde Amendment, Which Bans Federal Funds for Abortions*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/politics/biden-hyde-amendment.html [https://perma.unl.edu/494X-6S7T].

45. CHARLES H. FRANKLIN, PUBLIC VIEWS OF THE SUPREME COURT 21 (Oct. 2019), https://law.marquette.edu/poll/wp-content/uploads/2019/10/MULawPollSupremeCourtReportOct2019.pdf [https://perma.unl.edu/X8XQ-RSN6].

46. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Ryan C. Black & Amanda C. Bryan, *The Policy Consequences of Term Limits on the U.S. Supreme Court*, 42 OHIO N. U. L. REV. 821 (2016); Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131 (2003).

47. *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx [https://perma.unl.edu/U2W3-ZS5K] (last visited Feb. 3, 2020) (finding that 92% of respondents support requiring background checks for gun sales).

48. Domenico Montanaro, *Americans Largely Support Gun Restrictions to 'Do Something' About Gun Violence*, NPR (Aug. 10, 2019, 7:00 AM), https://www.npr.org/2019/08/10/749792493/americans-largely-support-gun-restrictions-to-do-something-about-gun-violence [https://perma.unl.edu/E4Y7-M9UL] (noting that the National Rifle Association's long-term opposition to universal background checks may have prevented such legislation from moving forward).

course usually requires some semblance of current or future plausibility, cultural discourse can envision or imagine social constructs that nearly everyone rejects as implausible. Cultural discourse also occurs more broadly and more frequently than legal and political discourse. All of us are shaped by legal and political discourse, but not all of us directly participate in those discourses. In contrast, almost everyone participates in some form of cultural discourse: we share ideas and form beliefs in schools, workplaces, and churches; we react to (and increasingly participate in) media, social media, and entertainment; and we argue with family and friends about everything under the sun. As these examples suggest, the vast majority of cultural discourse is relatively mundane. It is sometimes more provocative at its fringes.

Perhaps most interestingly, some fringe cultural arguments eventually gain traction with a broader audience—they move from fringe to mainstream, then into political discourse, and eventually, some of them even move into legal discourse.[49] As fringe arguments spread, they can also move from beyond unreasonable to merely unreasonable—and sometimes they even become reasonable. Importantly, this transition from fringe to mainstream is not simply a matter of how many people accept the reasonableness of a belief. All new, innovative, shocking, and disruptive ideas begin with a small minority of society. Sometimes these ideas capture widespread social support on the way to becoming less unreasonable.

The line between unreasonable and beyond unreasonable in cultural discourse helps determine the boundaries of acceptable society.[50] For example, many people would find a conservative or liberal ideologue unreasonable but a neo-Nazi or anarchist beyond unreasonable. The religious zealot may be unreasonable, but the religious theocrat is beyond unreasonable. The libertarian who argues for abolishing all taxes is unreasonable, but the libertarian who defends the full autonomy of toddlers is beyond unreasonable. These lines can have stark consequences for movements and individuals: cultural discourse that migrates into political and legal discourse gives rise to prophets; cultural discourse that remains on the fringes makes pariahs.

III. THE REASONABLENESS LINES IN LAW

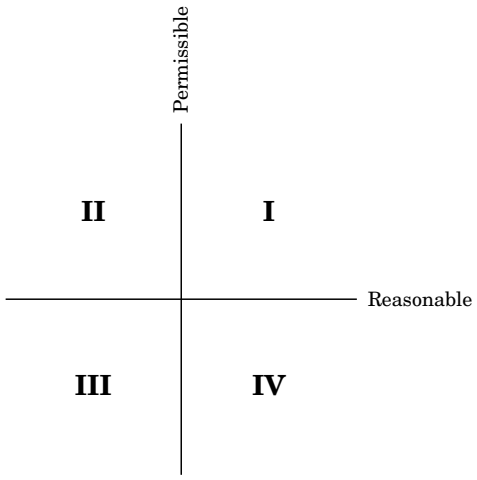
When social determinations of reasonableness enter the domain of law, they sometimes constrain behavior with the use or threat of

49. The example of gay marriage illustrates such a shift in a remarkably short time frame. *See Attitudes on Same-Sex Marriage*, *supra* note 9 (shifting from 2004–2019).

50. *See generally* GOFFMAN, *supra* note 34.

force.[51] But not all unreasonable acts are illegal, and not all reasonable acts are legal. Instead, reasonableness in law is further situated by legal permissibility and impermissibility.[52] We can think about the relationship between permissibility and reasonableness with the 2x2 chart in Figure 1:

Figure 1



51. The analysis in this Part focuses primarily on substantive determinations of reasonableness as distinct from the important question of how a legal tradition creates and sustains the meaning of reasonableness itself. An important example of the latter is the development of "artificial reason" in the common law tradition. *See* Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002) [hereinafter Postema *(Part I)*]; Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003) [hereinafter Postema *(Part II)*]. As Jeffrey Pojanowski observes, common law jurists did not view artificial reason as an appeal to universal principles (natural law), but as "a product of discipline, argument, and experience that seeks to identify, or approximate by construction ('artifice'), the community's shared reason on social problems. Artificial reason aspires to find the 'convergence of the views and judgments of the larger community, and forging and maintaining a common sense of reasonableness.'" Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1388 (2015) (quoting Postema *(Part II)*, *supra*, at 10).

52. Without law, many of us would feel and act less constrained, which would at once bring more autonomy and less stability. Left without any meaningful constraints, we would also cease to be a meaningful political community. As Hobbes recognized, the absence of any constraints is the absence of society. *See* THOMAS HOBBES, LEVIATHAN (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651). A related question of political theory is whether a society's laws are pragmatically oriented to maintaining public order or teleologically oriented toward some notion of "the good" or a "just society." One can imagine a society in which the only justification for some constraint is to maintain public order and safety. But laws based on notions of reasonableness also restrain behavior for other reasons.

Quadrant I captures the vast majority of unconstrained actions that people take in the world: actions that are both reasonable and permissible. Quadrant III covers constrained actions that most people do not take: actions that are both unreasonable and impermissible. These quadrants are fairly straightforward and, apart from borderline cases, uncontroversial. The relatively uncontroversial nature of most of the actions we take and do not take should also remind us of our shared humanity. When it comes to our sense of reasonableness, most of us agree more than we disagree.[53]

Quadrant IV represents actions that provoke some of our strongest disagreements: impermissible actions that many people find reasonable. For example, a woman who steals food to feed her starving child is likely guilty of theft, but many people would judge her actions reasonable under the circumstances.[54] Another category of reasonable but impermissible actions are those that the law classifies as strict liability offenses: sometimes we punish people even if they have no idea that their actions are illegal and have no intent to violate the law.[55] If you pick up a Native American artifact on federal land,[56] you may be guilty of a felony even if you had no idea that the object in your possession was illegal to possess. Sometimes we even punish eminently reasonable actions: jaywalking on an empty street,[57] parking in front of Dunkin' Donuts in a non-emergency,[58] or having an alcoholic beverage within 150 feet of a barbeque grill.[59]

Quadrant IV also captures unenforced laws: actions we deem reasonable under current cultural and political norms but that remain

53. *See, e.g.*, A. Barton Hinkle, *Americans Agree More than They Might Realize*, RICH. TIMES-DISPATCH (Oct. 21, 2017), https://www.richmond.com/opinion/our-opinion/a-barton-hinkle-column-americans-agree-more-than-they-might/article_d6ec93f9-f56b-5081-a4e4-f8f71643a04b.html [https://perma.unl.edu/TA4F-MATM] (noting at least 70% agreement on issues like alternative energy, handgun bans, sanctuary cities, extremist bigotry, medical marijuana, civil asset forfeiture, and universal background checks); Linton Weeks, *A Nation Divided: Can We Agree on Anything?*, NPR (Feb. 28, 2012, 10:11 AM), https://www.npr.org/2012/02/28/147338798/disagreeable-america-can-t-we-all-just-get-along [https://perma.unl.edu/38VM-N5RD] (more than 90% of Americans believed in God, supported troops who served overseas, and thought developing good math skills was important).

54. The law accounts for some of these situations through the doctrines of necessity and duress, which render legal an otherwise illegal action when the circumstances support the reasonableness of the action. *See, e.g.*, 21 AM. JUR. 2D *Criminal Law* § 135 (2020) (necessity); 21 AM. JUR. 2D *Criminal Law* § 137 (2020) (duress).

55. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 139–44 (8th ed. 2018).

56. *See* Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).

57. *See, e.g.*, OHIO REV. CODE ANN. § 4511.48 (West 2019) ("pedestrian crossing roadway outside crosswalk" is minor misdemeanor).

58. SOUTH BERWICK, ME., TOWN ORDINANCES art. III, § 15 (2019). The donut store is now called just "Dunkin'," but the law does not appear to have been updated at the time of this writing.

59. PAGEDALE, MO., CODE § 210.750(b)(2) (1992) (repealed Jan. 11, 2018).

technically impermissible.[60] For example, laws against fornication remain "on the books" in some jurisdictions.[61] Four hundred years ago, fornication was widely prosecuted and would have fallen easily within Quadrant III.[62] Today, fornication has moved to Quadrant IV: it remains impermissible in some jurisdictions but is generally viewed as reasonable. We can also illustrate this shift by considering the cultural and political reasonableness of a *restriction* against fornication. Two hundred years ago, enacting a law against fornication would have been unquestionably reasonable. Today, an effort to establish such a law would be beyond unreasonable, even to those who maintain personal or religious objections to fornication.[63]

Quadrant II represents activities that are legally permissible but are generally viewed as unreasonable: eating cats and dogs,[64] marrying your first cousin,[65] or publicly uttering a racial slur.[66] Absent extenuating circumstances, these activities are generally legal. But at

60. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591 (2001) ("[T]he statute books contain a host of crimes that are not crimes at all in terms of popular understandings. Prosecutors' incentives being what they are, these crimes are likely to go largely unenforced.").

61. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/11-40 (West 2019) ("A person commits fornication when he or she knowingly has sexual intercourse with another not his or her spouse if the behavior is open and notorious."); MINN. STAT. § 609.34 (2019) ("When any man and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor."). However, the trend seems to be that state courts will find these laws unconstitutional if they are presented with the issue. *See, e.g.*, Hobbs v. Smith, No. 05-CVS-267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006) (holding state fornication statute, N.C. GEN. STAT. ANN. § 14-184 (West 1994), violates substantive due process); *In re* J.M., 575 S.E.2d 441 (Ga. 2003) (holding state fornication statute, GA. CODE ANN. § 16-6-18 (West 2010), was unconstitutional as applied).

62. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 35 (1994) ("[I]n the seventeenth century, no crimes appear more often in the ancient pages of court records than fornication and other victimless crimes.").

63. The fact that individual and institutional objections to fornication can persist even as it becomes increasingly reasonable and permissible is one reason to doubt certain conservative religious arguments for the necessity of morality-based laws. *See* Scott Keyes, *Conservatives Aren't Just Fighting Same-Sex Marriage. They're Also Trying to Stop Divorce.*, WASH. POST (Apr. 11, 2014), https://www.washingtonpost.com/opinions/conservatives-arent-just-fighting-same-sex-marriage-they re-also-trying-to-stop-divorce/2014/04/11/5f649bd6-bf48-11e3-bcec-b71ee10e9bc3_story.html [https://perma.unl.edu/K9FM-5U8M]; Deborah L. Rhode, *Why Is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html.

64. Lauren Cahn, *20 Things You Think Are Illegal but Aren't*, MSN (Oct. 4, 2018), https://www.msn.com/en-us/lifestyle/did-you-know/20-things-you-think-are-illegal-but-aren't/ar-BBNVtNF [https://perma.unl.edu/88SL-PYG9].

65. *Id.*

66. *See infra* section IV.C.

least in most parts of the country, they are quickly condemned in culture and politics: legally permissible but culturally unreasonable.[67]

These four quadrants are not always clearly differentiated, particularly when we consider the interaction between permissibility and reasonableness in law. In some cases, the law requires an assessment of reasonableness to determine whether an activity is permissible. We can illustrate with the example of homicide, which is the killing of a human being by another human being.[68] Many homicides are not crimes: they are both permissible and reasonable. The woman who kills in self-defense, the police officer who kills to protect the life of another, and the soldier who kills an enemy combatant are all justified in their actions.[69] In this sense, justified homicides fall within Quadrant I. But on closer inspection, these conclusions of permissibility depend upon assessments of reasonableness. Whether an act of self-defense is permissible depends upon how we assess the reasonableness of the fear, imminence, and threat of harm that the killer perceived in the moment. Similar reasonableness assessments underlie all excused or justified homicides.

These puzzles and ambiguities are not confined to criminal law but also underlie important doctrines across many areas of law. In each case, the law's reasonableness assessments serve as proxies for social judgments. And across all of these areas of law, the category of reasonableness lacks mathematical precision: a "reasonable doubt" is "inherently qualitative";[70] the "reasonable person" is a composite of

67. *Id.*

68. Homicide is further complicated by differing statutory definitions of "human being" between jurisdictions. In at least one case, these varying definitions resulted in a child being declared legally dead in one state (California) before being transported to a different state (New Jersey) and then declared legally alive. *See* Rachel Aviv, *What Does It Mean to Die?*, NEW YORKER (Jan. 29, 2018), https://www.newyorker.com/magazine/2018/02/05/what-does-it-mean-to-die [https://perma.unl.edu/UP8R-DMJV].

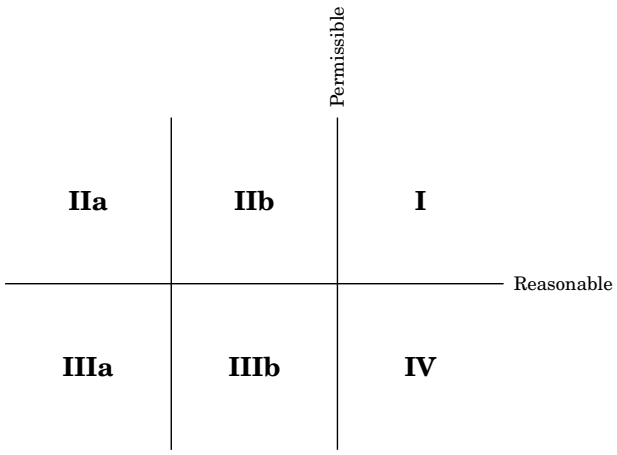
69. An excused homicide may not have been proper, but it is still adjudicated as nonculpable because it is reasonable; in some jurisdictions, the person who kills under duress acts reasonably. *See* 22 C.J.S. *Criminal Law: Substantive Principles* § 49 (2020) (describing excuse, which "recognizes the criminality of conduct, but excuses it because the actor reasonably but mistakenly believed that circumstances actually existed that would justify that conduct"); *id.* § 52 (discussing duress).

70. McCullough v. State, 657 P.2d 1157, 1159 (Nev. 1983); *see also* Cage v. Louisiana, 498 U.S. 39, 41 (1990) (discussing reasonable doubt), *overruled by* Estelle v. McGuire, 502 U.S. 62 (1991); KADISH, SCHULHOFER & BARKOW, *supra* note 2, at 40–43 (discussing reasonable doubt).

subjective and objective considerations;[71] and "reasonable" time, place, and manner restrictions can be highly contextualized.[72]

Sometimes the ambiguity of an action in law is not between reasonable and unreasonable but between unreasonable and beyond unreasonable.[73] Figure 2 introduces an additional line to the earlier chart that signifies this divide: activities to its left are beyond unreasonable and activities to its right (but to the left of the original vertical line) are merely unreasonable.

Figure 2



The additional line separating unreasonable and beyond unreasonable facilitates two further observations. First, even some activities that are culturally and politically beyond unreasonable remain legally permissible: these acts are represented by Section IIa. The example of

71. *See supra* notes 14–17 and accompanying text (discussing subjectivity of reasonableness).

72. For critiques of the reasonableness of time, place, and manner restrictions under the modern public forum doctrine, see John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1180–82 (2015). There, I argue that focusing on content-neutrality "misses the expressive connection between speech and the time, place, and manner in which it occurs." *Id.* at 1181. Time restrictions "can sever the link between message and moment"; place and manner restrictions can have similar effects. *Id.*

73. *Cf.* Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677, 698 (1999) ("Indeed, there may be a difference between a claim that has 'no chance of success' and one that has 'absolutely no chance of success,' a difference that is perhaps best illustrated through a continuum that measures reasonableness.").

Russian roulette falls within this category.[74] Section IIa also includes some egregious acts of omission, which are generally not criminalized: the man who does nothing to stop his friend from assaulting a young child,[75] the bystanders who fail to call the police when they hear a screaming woman,[76] the passersby who allows a victim of an automobile accident to drown in an inch of water.[77] Each of these inactions is legally permissible, but most people would find them beyond unreasonable.

The second observation illustrated by the additional line in Figure 2 plays out in the difference between IIIa and IIIb: the law distinguishes between unreasonable and beyond unreasonable among the activities that it proscribes. In other words, the law signals and enacts political and cultural distinctions between unreasonable and beyond unreasonable actions.

Consider again the example of criminal homicide. Most of us think that people who commit criminal homicide—people who kill without justification or excuse—are acting unreasonably.[78] But the law does not treat all criminal homicides the same. For example, many jurisdictions distinguish between intentional and unintentional criminal homicide. Roughly speaking, criminal homicides committed purposefully or knowingly are usually punished as murder, and those committed recklessly or negligently are punished as the lesser offense of manslaughter.[79] But many jurisdictions also encode additional social judgments in distinguishing between culpable homicides. Some murders are designated as more severe than others through designations like "premeditated" and "first-degree" (both of which differ from

74. There does not appear to be an express prohibition on Russian roulette in any U.S. jurisdiction.

75. *See* Cathy Booth, *The Bad Samaritan*, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,139892,00.html [https://perma.unl.edu/4LJ9-DEWX]; Rachel Crosby, *In Strohmeyer Case, 'Bad Samaritan' David Cash Led to New Law*, L.V. REV.-J. (May 19, 2017, 12:18 PM), https://www.reviewjournal.com/crime/homicides/in-strohmeyer-case-bad-samaritan-david-cash-led-to-new-law/ [https://perma.unl.edu/VZ39-QZ2T].

76. Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES (Mar. 27, 1964), https://timesmachine.nytimes.com/timesmachine/1964/03/27/97175042.html?pageNumber=1 [https://perma.unl.edu/EJ2E-5J4A] (discussing murder of Kitty Genovese); THE WITNESS (Five More Minutes Productions 2015) (documentary showing brother of Kitty Genovese investigating the circumstances of her murder).

77. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 78 (1991).

78. We also believe this about people whose culpability is excused for reasons of insanity or diminished capacity.

79. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. §§ 2501–04 (West 2019) (dividing criminal homicide into murder, voluntary manslaughter, and involuntary manslaughter, largely along these lines).

"purposeful").[80] And some unintentional homicides are punished as if they had been committed intentionally when they are committed with "depraved indifference," which characterizes the conduct leading to death as an intolerable blend of high risk, low utility, and moral blameworthiness.[81] In light of these distinctions, we could say that while all criminal homicides are legally impermissible and unreasonable, premeditated murder and depraved indifference manslaughter often warrant special condemnation—they are beyond unreasonable.[82]

We can also illustrate the differences between Sections IIIa and IIIb with the example of reckless driving. Driving offenses are usually considered *conduct* offenses: we punish the behavior when it is detected and prosecute regardless of whether someone is harmed.[83] In other words, our theory for punishing driving offenses is based on the risk of the activity rather than the harm it causes. But in practice, we view driving offenses differently. Think about the political and cultural differences between three different forms of reckless driving: speeding, texting while driving, and driving drunk. We could identify

80. *See, e.g.*, MINN. STAT. ANN. § 609.185 (West 2019) (murder in the first degree involves causing the death of a human being "with premeditation and with intent"); N.J. STAT. ANN. § 2C:11-3 (West 2019) (criminal homicide constitutes murder if person "purposely causes" death); 18 PA. STAT. AND CONS. STAT. ANN § 2502 (dividing murder into three degrees).

81. *See, e.g.*, People v. Bussey, 970 N.E.2d 404, 407 (N.Y. 2012) ("[D]epraved indifference murder is 'extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness.'" (quoting People v. Payne, 819 N.E.2d 634 (N.Y. 2004))).

82. Generally, but not always. Joshua Dressler's criminal law casebook illustrates the difficulty of classifying all premediated murders as especially heinous with the case *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987), *cited in* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 505 (6th ed. 2012). The defendant in Forrest was convicted of premeditated murder after shooting his terminally ill father in the head to end his suffering. Dressler notes:

> Premeditation and deliberation might only reflect "the uncertainties of a tortured conscience rather than exceptional depravity." Compare, for example, a person who impulsively pushes a small child sitting on a bridge into the river to a loving child who kills her terminally ill parent after long and careful consideration in order to end the parent's suffering. Under current law, if "premeditation" means anything, the impulsive killer is guilty of second-degree murder, and the mercy killer might be guilty of first-degree murder. Yet, as a function of depravity or dangerousness, most people would reverse the results.

Id. at 504–05 (footnotes omitted).

83. *Id.* at 114 ("Some crimes are defined, at least in part, in terms of harmful conduct. Harmful *results* are not required. An example of a 'conduct' crime would be the offense of 'intentionally driving under the influence of alcohol.' . . . This is a so-called 'conduct' crime because no harmful result is required to be guilty of the offense."). Conduct offenses are distinguished from result offenses, which focus on the harm that occurs. *Id.* ("An offense may be defined in terms of a prohibited result. Common law murder is a 'result' crime, because the social harm of the offense, as defined, involves 'the death of another human being.'").

the risk factors underlying these different forms of reckless driving and posit examples of each in which the risk of harm is identical (e.g., we could identify a speed, a level of texting, and a blood alcohol level that created equal levels of distraction or incapacitation). The harm to society represented by engaging in any of these three actions at those levels of risk would be identical. And yet there are ways in which the act of driving drunk seems "worse"—or more unreasonable—than either speeding or texting while driving. For example, many social and professional settings uniquely stigmatize drunk driving arrests and convictions: think of the perceived differences between a DUI citation and a citation for speeding or texting while driving. The law also reflects some of these differences. Many jurisdictions elevate the punishment for vehicular homicide while intoxicated far above vehicular homicide while speeding (at least if the speeding is below a certain threshold).[84] In other words, the law often signals that killing someone while driving drunk is beyond unreasonable whereas killing someone while speeding is unreasonable (or sometimes even reasonable). Even more perplexing, it appears that Americans drive drunk with alarming frequency. As a society, we may *say* that driving drunk is unreasonable or beyond unreasonable, but we do not *act* as if it is—according to one poll, 69% of American adults admit to having driven while buzzed.[85]

We can add one more twist to the drunk driving example to show how our intuitions of unreasonableness might also be linked to the *motive* underlying the act. Consider the case of Jennifer Axelberg.[86] In 2011, Axelberg was arrested for driving drunk in rural Mora, Minnesota. She and her husband had been drinking with friends at a remote lake cabin when he started beating her on the head. At two a.m., she ran to her car for protection and he chased after her. Once she entered the car, he pounded on the windshield so hard it began to shatter. She had no cell phone (he had taken it from her), so she drove off while intoxicated to find safety.

Do we think of Axelberg driving drunk in the same way that we think of a college student who drives after drinking too much at a

84. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-106 (West 2019) (homicide while driving recklessly is a Class 4 felony; homicide while driving under the influence of alcohol is a Class 3 felony); LA. STAT. ANN. § 14:32.1 (2019) (allowing intoxicated offender to be charged with "crime of violence" and providing for higher sentencing); TENN. CODE ANN. § 39-13-213 (West 2019) (homicide while driving recklessly is a Class C felony; homicide while driving under the influence of alcohol is a Class B felony).

85. *Drinking and Driving Habits*, ALCOHOL.ORG, https://www.alcohol.org/guides/drinking-and-driving-habits/ [https://perma.unl.edu/JP86-5D32] (last visited July 12, 2020).

86. *See* Axelberg v. Comm'r of Pub. Safety, 831 N.W.2d 682 (Minn. Ct. App. 2013) (describing the facts that follow), *aff'd*, 848 N.W.2d 206 (Minn. 2014).

party? What if she had driven down a crowded city block but not harmed anyone? What if she had struck and killed someone while driving for help in rural Mora? Our intuitions about the reasonableness of Axelberg's conduct likely account not only for her actions but also for her motive, the risk of harm created by her actions, and the actual harm (if any) resulting from her actions.[87] But that amalgam of factors means that we might assess identical actions or identical motives quite differently depending on the overall context.

Having set out the framework for the reasonableness lines, we can now turn to some applications in law.

IV. APPLICATIONS

The following four sections illustrate the ambiguities of the reasonableness lines across four areas of law: tax policy for medical expenses, criminal punishment, speech restrictions, and tort liability for inherently dangerous sports.[88]

A. Unreasonableness in Tax Policy

One way the law approximates the line between unreasonable and beyond unreasonable is through tax policy. Tax exemptions and deductions define what qualifies as contrary to well-established public policy,[89] what counts as a reasonable charitable deduction,[90] and what qualifies as a legitimate real estate expense.[91] But the baseline for reasonableness is not always obvious.[92]

87. In the actual case, which did not involve harm to a third party, the Minnesota Supreme Court rejected Axelberg's necessity defense. *See Axelberg v. Comm'r of Pub. Safety*, 848 N.W.2d at 206.

88. These four examples are illustrative but not exhaustive. For example, what qualifies as "frivolous" for sanctions under Rule 11? *See* Levine, *supra* note 73, at 678 (arguing for a continuum in Rule 11 sanctions "which will allow and require courts to assign a value of reasonableness to claims that come before them"); *see also* Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 537 (1986) (arguing for spectrum of reasonableness in Rule 11 context with "three distinct zones: (1) clearly reasonable; (2) clearly unreasonable; and (3) a mid-zone where the conduct cannot be readily categorized").

89. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

90. *See* Stephen Labaton, *Clinton Taxes Laid Bare, Line by Line*, N.Y. TIMES (Apr. 16, 1994), https://www.nytimes.com/1994/04/16/us/clinton-taxes-laid-bare-line-by-line.html [https://perma.unl.edu/YJ3D-6M23] ("[T]he Clintons had gone so far as to deduct $2 for underwear donated to charities.").

91. French v. Comm'r, 59 T.C.M. (CCH) 966 (1990) (allowing write-off for private plane used to check on rental condo).

92. Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 BYU L. REV. 521, 538 n.63 (1994) ("According to Rawls, conscientious disobedience of tax laws is inappropriate because reasonable minds may differ: it is never clear when such laws are unjust."); Thomas J. Schenkelberg, *Not-for-Profit Perspective*, 28 J. COMPENSATION & BENEFITS 8 (2012) (analyzing "rebuttable presumption of reasonableness"

Consider the line drawing implications of deductions for medical care expenses. Section 213 of the Internal Revenue Code allows taxpayers to deduct expenses "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[93] Should this deduction cover cosmetic surgery? The Internal Revenue Code has defined limits on the deductibility of such expenses since 1942.[94] The limits initially allowed deductions for cosmetic surgery "for the purpose of affecting any structure or function of the body."[95] That led to a series of cases and rulings over the deductibility of hair transplants and facelifts.[96] In 1990, Congress altered the provision to clarify that deductions for the cost of cosmetic surgery would only be allowable for surgery "necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease."[97] This clarification led to additional ambiguity, particularly around issues related to medical treatment of gender dysphoria.

In 2010, the tax court addressed deductions for treatment of male-to-female gender dysphoria involving hormone therapy, sex reassignment surgery, and breast augmentation surgery.[98] Following a lengthy consideration of evidence pertaining to the medical necessity of these treatments, the court concluded that hormone therapy and sex reassignment surgery were allowable medical deductions.[99] However, it denied the deduction for breast augmentation surgery because the petitioner had already achieved "normal breasts" through hor-

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for executive compensation in 501(c)(3) organizations); Kristi R. Sutton & Inan Uluc, *If It Looks Like a Duck, Swims Like a Duck, and Quacks Like a Duck, It Is Probably a Duck! – Whether Late-Filed Tax Returns Constitute "Returns" for Purposes of Discharge Under § 523*, 93 AM. BANKR. L.J. 111 (2019) (discussing reasonableness in the context of late-filed tax returns).

93. I.R.C. § 213(a), (d)(1)(A) (2012). In general, "expenses serving both medical and personal objectives are not deductible if the medical benefit is secondary or remote, if the expenses would have been incurred even in the absence of the medical condition, or if the mode of achieving the medical benefit is needlessly expensive." BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 36.2 at *3 (2020).
94. *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 48 (2010).
95. *Id.*
96. WILLIAM D. ANDREWS & PETER J. WIEDENBECK, BASIC FEDERAL INCOME TAXATION 143 (7th ed. 2015).
97. *Id.*; *see also* I.R.C. § 213(d)(9)(A) (2012) ("The term 'medical care' does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.").
98. *See O'Donnabhain*, 134 T.C. at 54–63.
99. *Id.* at 69. Specifically, the court concluded that these procedures were medical treatments used to alleviate suffering that fell outside of the Code's definition of cosmetic surgery. *Id.* at 70.

mone therapy.[100] From that baseline, the court concluded that breast augmentation surgery was not deductible because it "[did] not meaningfully promote the proper function of the body or prevent or treat illness or disease."[101] In reaching this conclusion, the court encodes its own version of reasonableness with words like "normal" and "proper" and its assessment of the petitioner's objectives relative to those descriptions.[102] And by elsewhere allowing deductions for reconstructive breast surgery following a mastectomy,[103] its distinctions between motives and purposes illustrate the close link between what it deems "reasonable" and what it considers normatively appropriate.

Another application of Section 213's medical care deduction showing the granular nature of the reasonableness lines pertains to the deductibility of costs for medically-advised travel.[104] In 1949, the tax court ruled against a couple claiming the medical deduction for expenses for travel to better climates.[105] The case involved a Pennsylvania woman whose cardiologist recommended that she go to the seashore in humid months and Arizona during the winter after she

100. *Id.* at 72. The court concluded that the surgeon's presurgical notes and other contemporaneous documentation indicated that the petitioner's breasts before the surgery "were within a normal range of appearance" and found no documentation "concerning petitioner's comfort level with her breasts 'in the social gender role.'" *Id.* at 72–73. Judge Halpern's concurrence criticized the court's interpretation of the contemporary evidence but nevertheless agreed with the court's disallowance of the deduction. *Id.* at 77–78 (Holmes, J., concurring).

101. *Id.* at 72 (majority opinion) (alteration in original) (quoting I.R.C. § 213(d)(9)(B) (2006)); *see also id.* at 100 (Holmes, J., concurring) ("O'Donnabhain's new baseline having been established through hormones, I would hold that the surgery was directed at improving—in the sense of focused on changing what she already had—her already radically altered appearance."). Judge Holmes's concurrence suggested that the majority's "extensive analysis" about the medical necessity of sex reassignment surgery "drafts our Court into culture wars in which tax lawyers have heretofore claimed noncombatant status." *Id.* at 85. Holmes also asserted that the court's "discussion of the science is . . . weak even by the low standards expected of lawyers." *Id.* at 92.

102. *See, e.g.*, *id.* at 72 (majority opinion) (petitioner already had "normal breasts"); *id.* at 72–73 (discussing I.R.C. § 213(d)(9)'s requirement that cosmetic surgery does "not meaningfully promote the proper function of the body"). The court also concluded that "cross-gender hormone therapy and sex reassignment surgery are well-recognized and accepted treatments for severe [gender identity disorder]." *Id.* at 70. As a result, "a 'reasonable belief' in the procedures' efficacy is justified [here]." *Id.*

103. *Id.* at 90–91 (Holmes, J., concurring).

104. The Code of Federal Regulations elaborates that "an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care." 26 C.F.R. § 1.213-1(e)(1)(ii) (2020).

105. Havey v. Comm'r, 12 T.C. 409, 413 (1949).

suffered a coronary occlusion.[106] The court found the physician's advice insufficient to establish the necessary link between the treatment and the medical condition.[107] Three weeks later, the tax court held in favor of a family that deducted travel-related medical expenses.[108] After their daughter was diagnosed with bronchitis bordering on pneumonia, her parents discussed with her doctor whether she should move to Arizona.[109] Her father claimed deductions for the costs of the travel to Arizona and the costs of enrolling her in a boarding school there. The court allowed deductions for cost of travel and maintenance (meals, lodging, and medical facilities),[110] concluding that the treatment bore a "reasonable relation" to the illness.[111] Both of these cases, decided weeks apart, involved a medically prescribed move to warmer, more hospitable climates. But the court upheld the deduction in one and denied it in the other. Other cases raise similar line-drawing questions around reasonableness.[112]

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106. *Id.* at 409. In 1945, Havey and her husband spent July in New Jersey, were again in New Jersey for ten days in October, and spent six weeks in Arizona between November and December. *Id.* at 410.

107. In disallowing the woman and her husband to deduct their travel and maintenance expenses, the court noted that "the record does not specifically link the treatment of coronary occlusion with a change of climate" and specified that "[t]he generally accepted treatment is restricted activity, rest, and the proper use of certain drugs." *Id.* at 412. The court also considered it significant that the couple had previously traveled to Atlantic City and Arizona on vacations; that their first trip happened twenty months after the health problem arose; and that the timing of the trips did not correspond to the worst periods of weather, as would be expected if seeking to mitigate climate-related symptoms. *Id.* at 413.

108. Stringham v. Comm'r, 12 T.C. 580, 586 (1949).

109. *Id.* at 581.

110. *Id.* at 586. The court allowed part of the boarding school deduction, making a distinction between educational and medical expenses. The court rejected the deduction for educational expenses: "[t]he child's attendance at school appears to us to have been merely an additional activity, unrelated in any way to the cure or alleviation of the disease from which she was suffering." *Id.* But the amount allocated to medical expenses seems fairly arbitrary: "[s]ince it is impossible from the record to accurately determine what proportion of the tuition charged by the school represented the cost of medical facilities or the child's meals and lodging, we have selected the figure of $850 of the total amount paid by petitioner to the school." *Id.* A concurrence argued that the decision to keep the girl in Arizona for six months could not reasonably be viewed as intended merely to treat a specific episode of bronchitis, but must have been intended also to prevent her from catching any further illnesses; as prevention is allowable under the statute, the same outcome results. *Id.* at 587 (Murdock, J., concurring).

111. *Id.* at 585 (majority opinion). In situations such as this one, where it is not immediately evident that the deductions were for a medical rather than a personal expense, the facts must be considered carefully. *Id.* at 584.

112. In *Tautolo v. Commissioner*, the tax court's disallowance of deductibility of medical expenses seemed at least partially linked to its perceived reasonableness of the treatment. Tautolo v. Comm'r, 34 T.C.M. (CCH) 1198 (1975). Following paralysis from a massive stroke, Faamaise Tautolo and her husband traveled to Samoa at the suggestion of family members after nearly twenty physicians opined

Some cases are more obvious. From 2004 to 2005, New York tax lawyer William Halby claimed medical deductions for the costs of pornography, prostitutes, and materials on sex therapy.[113] Halby did not discuss his actions with any doctors, nor had any doctor recommended any of these activities as a form of treatment for any condition. The tax court noted that the expenses for prostitutes were non-deductible since prostitution was illegal in New York, and that the pornography and sex therapy materials were personal items, not part of the treatment for a specific medical condition.[114]

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that her case was "virtually hopeless." *Id.* Native Samoan doctors unsuccessfully treated Faamaise with "prayer and massages with plant leaves." *Id.* The court accepted the couple's testimony that the "sole motivation for traveling to Samoa" was for Faamaise's medical care. *Id.* at 1199. However, the court found this motivation insufficient to "demonstrate a direct or proximate relation between the expense and the diagnosis, cure, mitigation, treatment or prevention of disease," elaborating that the couple had apparently accepted "American medical practice" and turned to the Samoan doctors only as a last resort, despite not knowing of any cases of successful treatment for such an illness. *Id.* at 1200. In *Harris v. Commissioner*, the court concluded that a diabetic man could not deduct as a medical expense the cost of foods bought per a prescribed diet. Harris v. Comm'r, 46 T.C. 672, 674 (1966). The court noted "that where special food or beverage is taken as a substitute for food or beverage normally consumed by a person and satisfies his nutritional requirements, the expense incurred is a personal expense." *Id.* at 673. A decade later, however, in *Randolph v. Commissioner*, the court approved the deduction of two taxpayers who took a medical deduction for organic foods. Randolph v. Comm'r, 67 T.C. 481 (1976). The couple both had extreme sensitivity to chemicals that often contaminate foods due to pesticides, herbicides, and packaging. *Id.* at 483–84. The cost of organic foods was approximately twice as much as conventional food, and the couple claimed a deduction for the additional cost. *Id.* at 484. The court found that, on these facts, "the additional expense [the taxpayers] incurred in restricting their diets to chemically uncontaminated food is an expense incurred for medical care deductible to the extent allowable under section 213." *Id.* at 485. In distinguishing this case from *Harris*, the court noted that the couple only sought a deduction for the additional cost of the organic food, and they provided ample evidence of the cost difference as well as the medical need and the medical benefit of their diet. *Id.* at 488–89.

113. Halby v. Comm'r, 98 T.C.M. (CCH) 57930 (2009). The IRS rejected the following expenses as medical deductions: for 2004, "(1) $2,368 for medical books, magazines, videos, and pornographic material; (2) $65,934 for prostitutes; and (3) $5,632 in bank and finance charges incurred in connection with loans used to pay for the claimed medical expenses"; and for 2005, "(1) $5,005 for books, magazines, videos, and pornographic materials; and (2) $42,152 for prostitutes." *Id.* at 3–4.

114. *Id.* at 7. *But see* Darla Mercado, *5 Weird Tax Deductions the IRS Has Allowed*, CNBC (Mar. 7, 2019, 11:37 AM), https://www.cnbc.com/2019/03/07/5-weird-tax-deductions-the-irs-has-allowed.html [https://perma.unl.edu/LVK6-ELX7] (building swimming pool to lose weight or buying clarinet lessons to correct an overbite could be deductible as medical expenses); Robert W. Wood, *10 Crazy Sounding Tax Deductions IRS Says Are Legit*, FORBES (Jan. 26, 2015, 8:18 AM), https://www.forbes.com/sites/robertwood/2015/01/26/10-crazy-sounding-tax-deductions-irs-says-are-legit/#37ab3d593bcc [https://perma.unl.edu/2C96-L5ZC] (citing tax

Taken together, these cases demonstrate the tax court's efforts to distinguish between legitimate medical deductions and those that are merely personal expenses. In some cases, the court considers potential non-medical benefits from the expense and attempts to balance differing cultural and religious views on medicine.[115] The court also looks to whether a treatment is "generally accepted" for the illness at issue.[116] Some treatments are excluded if the court finds them inconsistent with the taxpayer's prior medical decisions, which may exclude alternatives that individuals seek only after the failure of conventional medical treatments.[117] The net effect of these decisions signals that some expenses are reasonable (and therefore deductible), some are unreasonable (and disallowed), and some are even beyond unreasonable. More generally, deductions under the Internal Revenue Code illustrate how the reasonableness lines play out in law and policy. Once Congress decides to subsidize only some medical expenses through deductions, a certain amount of line-drawing is inevitable. And those lines may serve as proxies for contested notions of reasonableness. Denying a subsidy is not the same as prohibiting a practice. But the refusal to subsidize may maintain or generate social stigma, sometimes intentionally.[118] Here, as elsewhere, the law's determination of reasonableness bleeds into politics and culture.

B. Unreasonableness in Criminal Punishment

One of the clearest illustrations of the murkiness of the reasonableness lines and their connections to law, politics, and culture is the way that we punish. Consider three examples of criminal punishment: amputation of a hand, the death penalty, and incarceration. These

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court cases that allow deductions for exotic dancer's breast augmentation, bodybuilder's body oil, and junkyard owner's pet food).

115. *E.g.*, *Tautolo*, 34 T.C.M. (CCH) at 1200 (indicating that the court would "pass no judgment on the competence of native Samoan doctors or the efficacy of the treatments they administer" and discounting the relevance of their lack of medical degrees).

116. Havey v. Comm'r, 12 T.C. 409 (1949).

117. *Tautolo*, 34 T.C.M. (CCH) at 1198.

118. *See, e.g.*, Amy Moore, *Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference*, 56 S. TEX. L. REV. 117, 125 (2014) ("Section 501(c)(3) exemptions and corresponding § 170 deductions are thus culturally more about approval and stigma than they are simply about paying more taxes than a university otherwise would."); Russell J. Upton, Comment, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793, 857 (2001) ("By revoking the B.S.A.'s state-level tax exemption, New Jersey can send a powerful message that the state government officially disapproves of the B.S.A.'s anti-gay policy. . . . [I]f tax-exemption revocation officially stigmatizes the B.S.A., more municipalities and public school systems will seek to distance themselves from the organization, further undermining B.S.A. support.").

forms of punishment all inflict stigma, violence, and humiliation upon the wrongdoer.[119] In past societies, each of these three forms of punishment would have been reasonable under law, politics, and culture. Today, they are perceived quite differently from one another in this country: most Americans view amputation of a hand as beyond unreasonable,[120] there is a sharp and heated debate as to the reasonableness of capital punishment,[121] and many Americans view solitary confinement as reasonable, despite strong evidence of psychological and other harms resulting from that form of confinement.[122]

Perhaps even more surprisingly, some forms of punishment far more benign than any of these three are viewed as unreasonable or even beyond unreasonable. Consider the use of shaming sanctions: criminal punishments deliberately aimed at stigmatizing or humiliating a wrongdoer. One of the more common examples of shaming sanctions follows in the tradition of *The Scarlet Letter*: requiring those convicted of crimes to wear or post signs indicating their transgressions. In one case, a judge ordered the defendant to wear a sandwich

119. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

120. *See, e.g.*, John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1189 (2001) ("If the reference to 'life' in the Double Jeopardy Clause is to be read in isolation, and as forever insulating the death penalty from constitutional evaluation, it would follow that 'limb' should be as well, thus apparently insulating the amputation of an arm or leg from invalidation as a cruel and unusual punishment—a conclusion we can confidently label ridiculous."); Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123, 131 (1994) ("Amputation of a limb, for instance, is a paradigm case of cruel and inhuman punishment."). Yet, other countries continue to use amputation as a form of punishment—which further illustrates the social and contextual nature of the reasonableness lines. *See, e.g.*, Melanie Reid, *Crime and Punishment, a Global Concern: Who Does It Best and Does Isolation Really Work?*, 103 KY. L.J. 45, 57 (2014) ("In many countries such as Saudi Arabia, Sudan, Yemen, Mali, and Iran, amputation is used as a form of punishment and serves as an extremely powerful deterrent.").

121. *See* J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ [https://perma.unl.edu/L7Y5-46AJ] (noting that in 2018, 54% of Americans favored the death penalty for people convicted of murder and 39% opposed it).

122. *See* Katie Jagel, *Support for Solitary Confinement*, YOUGOV (Oct. 9, 2013, 1:56 PM), https://today.yougov.com/topics/politics/articles-reports/2013/10/09/us-prisons [https://perma.unl.edu/9SUJ-HNHN] (56% view solitary confinement as appropriate, while 13% view solitary confinement as a form of torture). Even the question of where we punish raises important issues of reasonableness. Today, the premise of incarceration is generally accepted as reasonable, and most incarceration occurs far outside of the public eye. In contrast, incarceration was relatively rare in colonial America and criminal penalties were "intentionally exacted in full view of the community, which represented an ideal of behavior that the shamed one should emulate." Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES (Jan. 16, 1997), https://www.nytimes.com/1997/01/16/us/crime-and-punishment-shame-gains-popularity.html [https://perma.unl.edu/NG24-5TQH].

board with the words "I stole mail" after his conviction for mail theft.[123] Another defendant had to post a sign at the end of his driveway which stated: "Warning! A Violent Felon lives here. Enter at your own risk!"[124] These kinds of sanctions may be humiliating, but it is unclear why they are any more unreasonable than most other forms of criminal punishment, almost all of which involve humiliation and shame.[125] The perp walk, the mug shot, the spectacle of the trial, and the administration of post-release parole conditions can all humiliate, stigmatize, and shame.[126] Yet all of these are viewed as reasonable while shaming sanctions are not.

These questions of reasonableness extend to other controversial sanctions like corporal punishment. The imposition of state-sanctioned physical trauma on the body is an example of a form of punishment generally viewed as beyond unreasonable by most members of society.[127] But why is this the case? Peter Moskos asks a version of this question in his book, *In Defense of Flogging*: "Given the choice between five years in prison and ten brutal lashes, which would you choose?"[128] Moskos elaborates in graphic detail about each of these

123. United States v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004).

124. People v. Meyer, 680 N.E.2d 315, 316 (Ill. 1997). Dan Kahan cites this example in Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–35 (1996). *See also, e.g.*, Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 365–66 (1999) (describing one city's shaming punishment and arguing that shaming "may offer a cost-effective and politically acceptable alternative to the short terms of imprisonment that [white-collar] offenders now typically receive"); *id.* at 367 ("Many white-collar offenders—of the conventional variety—are also being shamed. In Cincinnati, for example, a judge ordered a corporate executive to write letters of apology and to publish newspaper ads publicizing his company's contamination of the groundwater with carcinogenic chemicals. In New York, a slumlord was sentenced to house arrest in one of his rat-infested buildings (where tenants greeted him with a banner that read, 'Welcome, Reptile!'). In lieu of a 10-year prison sentence, a Minnesota woman convicted of embezzling $195,000 for gambling had to publish a letter of apology to her community. Ohio farmers convicted of 'steer swapping'—a fraud to win prize money in fairs—were forced to own up publicly to being 'cheaters.'" (footnotes omitted)).

125. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060 (1998) ("[E]very punishment can involve some element of shaming.").

126. For some wrongdoers, ongoing requirements like sex offender registries perpetuate the stigma and humiliation well after time has been served.

127. Generally, but not always. *See, e.g.*, Alan Blinder, *What to Know About the Alabama Chemical Castration Law*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/us/politics/chemical-castration.html [https://perma.unl.edu/E3LD-XGGC].

128. PETER MOSKOS, IN DEFENSE OF FLOGGING 2 (2013). When I ask this question to the students in my first-year criminal law classes, the preference is overwhelmingly for flogging; in fact, in ten years of teaching, only one student has indicated a preference for prison over flogging.

alternatives.[129] He notes that while flogging is "a severe and even brutal form of punishment" in which "skin is literally ripped from the body," the punishment of incarceration may be much worse:

> Five years in prison is a long time. Where were you five years ago? Perhaps you've accomplished a lot in the past half-decade. Perhaps you had ambitious plans for the next five years. Whatever your plans were, they're not going to happen now. Before they lead you out the back of the courtroom to a holding room, you seriously ponder many things about prison you've tried hard to avoid. Your lover or spouse may leave you (or at least have an affair). Whatever you're needed for, you're not going to be there. If you have kids, they're going to miss you, and be missed by you. Over the coming years, will your friends visit? And if they don't, what can you do? There's a very good chance that, when you emerge after your time is up, you're going to be alone and unemployed.[130]

The costs of prison are even higher when we account for the physical and psychological realities of incarceration for many inmates.[131]

The example of criminal punishment leaves us with uncomfortable questions about the reasonableness lines. What we think is reasonable or unreasonable differs significantly from earlier times in American history and from the judgments of other countries today.[132] And even on our own terms, it is not clear why shaming sanctions are perceived to be worse than incarceration, or why flogging is beyond the pale but years of solitary confinement is still a permissible punishment. As the next section demonstrates, we find similar puzzles when it comes to our views about speech, especially when we consider changes over time.

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129. *Id.* at 2, 4.

130. *Id.*

131. *See, e.g.*, Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html [https://perma.unl.edu/4X9J-WG8X] (including photos sent to the *New York Times* from the inside of an Alabama prison); Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise [https://perma.unl.edu/J5B4-MLS7] ("The [Bureau of Justice Statistics] has estimated that more than 200,000 inmates are sexually abused in American detention facilities annually."); Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 258–61 (2013) (discussing studies regarding negative psychological effects of incarceration). DeVeaux was himself a prisoner: "I found the prison experience traumatic because of the assaults and murders I witnessed while incarcerated [and] because of the constant threat of violence . . . . [T]he threat of violence was real and ever present." *Id.* at 264–65.

132. *See, e.g.*, The Associated Press, *Saudi Arabia Cuts Off Thief's Hand as Punishment*, HAARETZ (Dec. 15, 2014), https://www.haaretz.com/saudis-cuts-off-thief-s-hand-as-punishment-1.5346966 [https://perma.unl.edu/4K42-B86N].

C. Unreasonableness in Speech Restrictions

In 1838, a disaffected minister named Abner Kneeland declared himself a pantheist, arguing that the God worshipped by Christians was "nothing more than a mere chimera of their own imagination" and that the story of Jesus was "a fable and a fiction."[133] For these words, Kneeland was indicted, convicted, and sentenced to imprisonment for blasphemy.[134] Today, most Americans would find it beyond unreasonable to imprison someone for disparaging a deity.[135] And yet, some countries today imprison and even execute people for blasphemy.[136]

In 1940, Walter Chaplinsky was distributing religious literature on a public sidewalk in downtown Rochester, New Hampshire.[137] When a city official confronted him, Chaplinsky called him a "damned racketeer" and a "damned Fascist."[138] Chaplinksy was charged and convicted under a statute prohibiting offensive speech directed at others in a public place.[139] Two years later, the United States Supreme Court affirmed his conviction, reasoning that "[a]rgument is unnecessary to demonstrate that the appellations . . . are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[140] Today, it is hard to imagine Chaplinsky's words provoking someone to physical violence, let alone sending him to jail for uttering them.

In 1968, nineteen-year-old Paul Robert Cohen walked into a Los Angeles courtroom wearing a jacket emblazoned with three words, the second and third of which were "the draft," and the first of which was a four-letter imperative rhyming with "truck."[141] Cohen's jacket led to his arrest, prosecution, and conviction for violating California's criminal restrictions on "offensive conduct."[142] The Supreme Court held

133. Commonwealth v. Kneeland, 37 Mass. 206, 207 (1838).
134. *Id.* Kneeland appealed to the Supreme Judicial Court of Massachusetts, which sustained his conviction. *Id.*
135. Angelina E. Theodorou, *Which Countries Still Outlaw Apostasy and Blasphemy?*, PEW RES. CTR. (July 29, 2016), https://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/ [https://perma.unl.edu/2R72-FE7L] ("The U.S. does not have any federal blasphemy laws, but as of 2014, several U.S. states . . . still had anti-blasphemy laws on the books. However, . . . the First Amendment . . . would almost certainly prompt a court to ban the enforcement of any such law.").
136. *Id.* ("[M]en [in Sudan] face the death penalty for following a different interpretation of Islam than the one sanctioned by the government. . . . Blasphemy—defined as speech or actions considered to be contemptuous of God or the divine—is [also] a capital crime in Pakistan.").
137. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).
138. *Id.*
139. *Id.*
140. *Id.* at 574.
141. Cohen v. California, 403 U.S. 15, 16 (1971).
142. *Id.* at 22.

otherwise: the state could not criminalize Cohen's jacket-wearing. After all, as the Court noted, "one man's vulgarity is another's lyric."[143] Perhaps taking this turn of phrase a bit too literally, a long line of performers from Limp Bizkit to Kanye West have since enlisted Cohen's word of choice toward purportedly lyrical ends.[144] Today, public decency and public order laws rarely constrain vulgar language.[145] Paul Cohen's jacket may still be relatively rare in courtrooms, but most of George Carlin's "seven dirty words" are now common in public settings (even if the Federal Communications Commission still throws occasional fits over broadcast expletives).[146]

Abner Kneeland, Walter Chaplinsky, and Paul Cohen remind us that in earlier times in this country, legal, political, and even cultural discourse aligned to endorse the reasonableness of criminal restrictions upon blasphemous, hostile, and vulgar language. Today, most of these lines have shifted considerably. You and I can say almost anything to anyone.[147] We can say words that damage others emotionally and psychologically.[148] We can disparage deities and mock the people who worship them.[149] We can invoke phrases intended to provoke and

143. *Id.* at 25.

144. *See, e.g.*, LIMP BIZKIT, *Hot Dog*, *on* CHOCOLATE STARFISH AND THE HOT DOG FLAVORED WATER (Flip & Interscope Records 2000); KANYE WEST, *Two Words*, *on* THE COLLEGE DROPOUT (Def Jam Recordings & Roc-A-Fella Records 2004).

145. This paragraph draws from John Inazu, *Please Join Me in Expressing Displeasure with the Draft*, COMMENT (Feb. 16, 2017), https://www.cardus.ca/comment/article/please-join-me-in-expressing-displeasure-with-the-draft/ [https://perma.unl.edu/4Z8U-JLDE].

146. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); Jean M. Twenge, Hannah VanLandingham & W. Keith Campbell, *The Seven Words You Can Never Say on Television: Increases in the Use of Swear Words in American Books, 1950–2008*, SAGE OPEN, July–Sept. 2017, at 1, 2, 4 (using Google Books database of five million books to track the increased prevalence of Carlin's seven dirty words in American books and finding that "[r]eaders of books in the late 2000s were 28 times more likely than those in the early 1950s to come across one of the 'seven words you can never say on television'").

147. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 93 (2016) [hereinafter INAZU, CONFIDENT PLURALISM].

148. *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

149. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." (citing Cantwell v. Connecticut, 310 U.S. 296, 310 (1940))).

offend.[150] Part of this shift is owed to the expansion and entrenchment of First Amendment speech protections.[151]

The relatively few examples where direct restriction of speech is permissible under the First Amendment illustrate the reasonableness lines and their contested nature. For example, almost all sexually explicit speech is legally permissible under the First Amendment. However, the Supreme Court's decision in *Miller v. California* permits restrictions on speech or expression that "appeals to the prurient interest" and "depicts or describes, in a patently offensive way," sexual conduct or excretory functions.[152] Kathleen Sullivan has aptly observed that the *Miller* test requires obscene material to "turn you on and gross you out" at the same time.[153] But the category of obscenity is further constrained by "the average person, applying contemporary community standards."[154] In 1983, the Second Circuit concluded that "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" were not obscene in light of community standards prevailing in New York City.[155] That was over thirty years ago.[156] Today, only a fraction of sexually explicit material meets the *Miller* definition for obscenity.[157]

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150. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (holding damages were not allowed to be awarded simply "because the speech in question may have an adverse emotional impact on the audience").

151. *See generally* INAZU, CONFIDENT PLURALISM, *supra* note 147, at 93–96 (summarizing argument).

152. Miller v. California, 413 U.S. 15, 24–25 (1973). The Court's full test is as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

153. *Quoted in* Jeffrey Rosen, *The End of Obscenity*, 2004 NEW ATLANTIS 75, 77 (2004).

154. *Miller*, 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

155. United States v. Various Articles of Obscene Merch., 709 F.2d 132, 134 (2d Cir. 1983).

156. Consider in this light the implausibility of Justice Stevens's assertion in a 2002 dissent that "[t]he kind of hard-core pornography" at issue in *Hamling v. United States*, 418 U.S. 87 (1974) "would be obscene under any community's standard" and "does not belong on the Internet." Ashcroft v. ACLU, 535 U.S. 564, 611 (2002) (Stevens, J., dissenting). The brochure at issue in *Hamling* included "pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts" involving one or more people, and, in two instances, a woman and a horse. *Hamling*, 418 U.S. at 92–93.

157. The few constraints placed upon the content of commercially available pornography usually come from mainstream suppliers like General Motors, Hilton Hotels, and Time Warner rather than from the state's obscenity laws. *See* Timothy Egan, *Erotica Inc. – A Special Report.; Technology Sent Wall Street Into Market for Pornography*, N.Y. TIMES (Oct. 23, 2000), https://www.nytimes.com/2000/10/23/us/er-

Restrictions on defamation and intentional infliction of emotional distress (IIED) provide another example. The IIED tort restricts "extreme and outrageous" speech or conduct.[158] But the standard is met only "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[159] In practice, not much defamatory or emotionally distressing speech will be so beyond unreasonable that it is also legally impermissible.

Indeed, few examples of controversial speech will rise to the level of legally impermissible. And yet there is also a great deal of speech that is clearly impermissible under the law. As Frederick Schauer has observed, the First Amendment does not prevent restrictions against securities fraud, perjury, criminal conspiracy, and other forms of communication that fall plainly under the definition of "speech."[160] These restrictions are uncontroversial precisely because the contextualized words that they constrain are widely understood to be beyond unreasonable. Some expressive restrictions never amount to legal claims because litigants, lawyers, and judges find them to be unassailable. This recognition may manifest at many stages of the litigation process—in the initial decision of a potential litigant not to raise a claim, in the strategic decision of counsel to argue another legal theory, in the decision of a judge to find a lack of standing, or in a dismissal based on frivolity.

Schauer has described the underlying factors justifying these restrictions as "the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not."[161] Yet even the core examples of speech that Schauer argues lie outside

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otica-special-report-technology-sent-wall-street-into-market-for-pornography.html [https://perma.unl.edu/P4LU-M3QQ]. As Ronald Collins and David Skover have argued, "In effect, nothing is commercially obscene unless the captains of commerce fear that it manifestly repulses mass tastes or offends mass values." RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 148 (2d ed. 2005).

158. Conduct can be extreme without being outrageous (climbing Everest) or outrageous without being extreme (marital infidelity). *See generally* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION 615–22 (8th ed. 2017).

159. Chanko v. Am. Broad. Cos., 49 N.E.3d 1171, 1178 (N.Y. 2016) (quoting Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993)). Chanko's family sued after ABC News aired footage of a loved one dying without their consent. Though the court believed the conduct "reprehensible," it did not think that it rose to the level of "extreme and outrageous." *Id.* at 1179.

160. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765–66 (2004).

161. *Id.* at 1768.

the boundaries of the First Amendment raise borderline questions of reasonableness. Take the example of criminal conspiracy. Schauer correctly notes that the First Amendment does not preclude the "vast domain of criminal law that deals with conspiracy and criminal solicitation."[162] But the history of the modern First Amendment is shaped by challenges to precisely these kinds of restrictions, which push the lines of reasonableness and permissibility in the law.[163]

D. Unreasonableness in Contact Sports

In May 2019, heavyweight champion Deontay Wilder made headlines when he announced that boxing "is the only sport where you can kill a man and get paid for it at the same time."[164] Wilder was referring to his upcoming title bout against Dominic Breazeale. He warned that Breazeale's "life is on the line for this fight, and I do mean his life."[165] According to Wilder, boxing is a "gladiator's sport," and since it is legal to kill someone in the ring, "Why not use my right to do so?"[166] Wilder emphasized that he wanted to "get me a body" on his record.[167] The head of the World Boxing Council, Mauricio Sulaiman, responded somewhat tepidly on Twitter that Wilder's comments were "regrettable and completely against the spirit of our sport."[168] The "metaphors," according to Sulaiman, were "against the WBC code of ethics."[169]

Still, Wilder's comments accurately describe the typical lack of criminal culpability if an opponent dies as the result of a sanctioned match.[170] Writing in *Business Insider*, Alan Dawson found Wilder's

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162. *Id.* at 1784.

163. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950); Whitney v. California, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

164. Alan Dawson, *Deontay Wilder's Desire to 'Get Me a Body' on His Boxing Record by Killing an Opponent Makes a Mockery of the Fighters Who Have Died Through the Sport*, BUS. INSIDER (May 16, 2019, 11:59 AM), https://www.businessinsider.com/deontay-wilder-desire-to-kill-opponent-makes-mockery-of-boxing-2019-5 [https://perma.unl.edu/8TM9-VN3E].

165. *Id.*

166. *Id.*; Josh Peter, *Deontay Wilder on Saturday Night's Opponent: 'If He Dies, He Dies'*, USA TODAY (May 15, 2019, 5:41 PM), https://www.usatoday.com/story/sports/boxing/2019/05/15/boxing-deontay-wilder-dominic-breazeale-if-he-dies-he-dies/3678409002/ [https://perma.unl.edu/CL57-J5UK].

167. Dawson, *supra* note 164. This was not the first time that Wilder said he "want[s] a body on [his] record." Dan Rafael, *Deontay Wilder: 'I Want a Body on My Record'*, ESPN (Mar. 30, 2018), https://www.espn.com/boxing/story/_/id/22969165/deontay-wilder-want-body-my-record [https://perma.unl.edu/KU9Y-FY52].

168. Mauricio Sulaiman (@wbcmoro), TWITTER (May 16, 2018, 11:29 AM), https://twitter.com/wbcmoro/status/1129061349902831616?lang=en.

169. *Id.*

170. *See* Jeffrey Standen, *The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence*, 99 J. CRIM. L. & CRIMINOLOGY 619, 620 (2009) ("As-

comments "certainly controversial, especially as boxing history is littered with the corpses of fighters who have died in the ring or shortly after competing."[171] As Dawson noted, twenty-three-year-old Bradley Stone died in 1994 after hits to the head during a fight at the Peacock Gym in Canning Town, London.[172] A statue outside the gym, Dawson noted, "acts as a constant reminder to respect the sport and its combatants."[173]

Sports like boxing require direct physical contact that would in other contexts constitute an intentional tort or criminal battery (or, in cases of death, a criminal homicide). In addition to boxing, MMA fighting, football, hockey, and lacrosse frequently require and sometimes encourage forceful body blows. Soccer and basketball players are less prone to regular blows, but occasional "hard fouls" create a nonzero risk of similar consequences.[174] Participants in these activities waive their right to pursue a legal remedy for injuries incurred during the normal course of play.[175] Tort law recognizes assumption of risk as an

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saults and batteries that would render an athlete subject to criminal prosecution were they to occur away from the playing field are considered 'part of the game' when they happen during the course of a violent sport.").

171. Dawson, *supra* note 164. For further coverage of Wilder's comments, see James Corrigan, *'I Want a Body on My Record': Deontay Wilder's Comments Are a Disgrace, but We the Boxing Public Are to Blame*, TELEGRAPH (May 15, 2019, 5:06 PM), https://www.telegraph.co.uk/boxing/2019/05/15/want-body-record-deontay-wilders-comments-disgrace-boxing-public/ [https://perma.unl.edu/82NP-6ARH] ("When you read Deontay Wilder's comments ahead of his WBC heavyweight title defence against Dominic Breazeale in New York on Saturday, what do you feel? Disgust, I would imagine, revulsion at one human being declaring he wants to kill another human being purely because he is allowed to in the name of his sport."); and Robert Morales, *Deontay Wilder May Be a Jerk, but He'll Still KO Dominic Breazeale*, L.A. DAILY NEWS (May 17, 2019, 9:37 AM), https://www.dailynews.com/2019/05/17/deontay-wilder-may-be-a-jerk-but-hell-still-ko-dominic-breazeale/ [https://perma.unl.edu/7UCA-4FSM] (discussing the "bad blood" between Wilder and Breazeale and the dislike that "is real, unlike how it often is in boxing when trash is being talked for the sake of higher ticket sales and TV ratings").

172. Dawson, *supra* note 164.

173. *Id.*

174. *See, e.g.*, Rob Hughes, *Different Standards, and Penalties, for Rough Play*, N.Y. TIMES (Oct. 5, 2010), https://www.nytimes.com/2010/10/06/sports/soccer/06iht-SOCCER.html [https://perma.unl.edu/EG6J-92WS] (discussing severe soccer injuries); Pat Mixon, *NBA's Hard Knock Life: The 10 Hardest Fouls of All Time*, BLEACHER REP. (Dec. 14, 2010), https://bleacherreport.com/articles/540874-hard-knock-life-the-nbas-top-10-hardest-fouls-of-all-time#slide1 [https://perma.unl.edu/4MH4-E7WX] (discussing equally severe injuries in basketball).

175. It is rare for athletes to face criminal charges for their activities on the field or court. *See* Danny Cevallos, *Why Athletes Generally Don't Face Criminal Charges for On-Court Fights*, NBC NEWS (Oct. 22, 2018, 1:01 PM), https://www.nbcnews.com/news/sports/why-athletes-generally-don-t-face-criminal-charges-court-fights-n922866 [https://perma.unl.edu/AB7T-V2S9]. Generally, "[a]ssaults and batteries that would render an athlete subject to criminal prosecution were they to occur away from the playing field are considered 'part of the game' when they

affirmative defense that can be raised against a negligence action.[176] Individuals who voluntarily expose themselves to a known risk or hazardous condition may be prevented from recovering damages if they sustain injuries from the risk or condition.[177] The theoretical justification for this doctrine is that the knowing assumption of risk removes the legal duty that would otherwise have been owed by the defendant.[178]

To mitigate the physical risks of play, officially sanctioned sports establish rules or norms that restrict the most egregious forms of contact. Participants who veer too far afield from these restrictions can exceed the boundaries of consent to the point of being criminally liable.[179] For example, if Deontay Wilder directed his punches toward

happen during the course of a violent sport." Standen, *supra* note 170. In rare cases, states have statutory exemptions for contact sports. *See, e.g.*, IOWA CODE ANN. § 708.1(3)(a) (West 2019) ("An act . . . shall not be an assault . . . [i]f the person doing any of the enumerated acts, and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace.").

176. *E.g.*, FED. R. CIV. P. 8(c) (listing "assumption of risk" as an affirmative defense); *see also* JILL D. WEINBERG, CONSENSUAL VIOLENCE: SEX, SPORTS, AND THE POLITICS OF INJURY 7 (2016) ("In tort law, assumption of risk is a form of implicit consent that bars or reduces a person's ability to recover damages . . . .").

177. *See* Taylor v. Burlington N. R.R. Co., 787 F.2d 1309, 1316 (9th Cir. 1986) ("At common law an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties constitutes an assumption of risk."); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480–81 (5th ed. 1984).

178. *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 707–08 (Cal. 1992) ("In cases involving 'primary assumption of risk'—where, by virtue of the nature of the activity and the parties' relationship to the activity, *the defendant owes no legal duty* to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery." (emphasis added)); *see also id.* at 708 ("Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm.").

179. *See* Standen, *supra* note 170 ("[I]n unusual, but not entirely rare, cases . . . the act of violence on the playing field subject[s] the participant to a risk of criminal prosecution. These cases typically involve a rather egregious act of violent assault that gains public notoriety and that so far transgresses the stated and unstated norms of the game to render the public prosecution relatively unproblematic."); *see also* State v. Floyd, 466 N.W.2d 919, 922 (Iowa Ct. App. 1990) ("We have no doubt that defendant and his victims had been participants. Given that play had officially ceased, that an altercation had broken out, and that defendant and some of his victims had been on the sidelines and not engaged in play activities, it is clear that defendant and his victims were not, at that time, 'voluntary participants in a sport.'"); Jeremy W. Peters & Liz Robbins, *5 Pacers and 5 Fans Are Charged in Fight*, N.Y. TIMES (Dec. 9, 2004), https://www.nytimes.com/2004/12/

Dominic Breazeale's head and refused to relent after interventions by the ring officials, he could be liable for criminal homicide if Breazeale died.[180] The legal analysis would focus on whether Wilder's conduct constituted an inherent part of the sport and whether a reasonable player would have understood and foreseen that risk entering into the contest, thereby consenting to that kind of conduct.

What counts as reasonable in sports "hinges on whether the cost of an untaken precaution outweighs that of a particular harm."[181] Players owe no duty to each other when injurious activity is an inherent part of the sport. This baseline effectively "brand[s] a broad range of risky activities reasonable as a matter of law."[182] For example, a basketball player might expect "a certain amount of pushing and shoving for position, the occasional elbow, and a fair number of open-handed slaps."[183] But activity that the player would not reasonably foresee—like "suddenly being set upon from the side or rear with a flurry of punches to the head"—could trigger liability.[184]

The law often assumes that "[a]nyone who participates in an organized, socially approved recreational activity is fully aware of the possibility of injury due to a violation of the rules of play, yet the decision to play may be perfectly reasonable."[185] For this reason, many states expect athletes to "know the risks that are simply inherent in all sports and recreational activities," and thus, "refuse to impose tort liability for negligence in sports."[186] But jurisdictions are beginning to find that injurious activity in sports is no longer "reasonable" when the conduct is reckless or intentional.[187] A state court in Illinois found that:

09/sports/basketball/5-pacers-and-5-fans-are-charged-in-fight.html [https://perma.unl.edu/R5NJ-VFTL] (athletes charged for role in brawl during Pacers-Pistons NBA game).

180. Or criminal attempt short of death. *Cf.* Gabe Feldman, *Legal Action in Wake of Saints 'Bounty' Revelations Not Likely*, NFL.COM (Mar. 4, 2012, 11:23 AM), http://www.nfl.com/news/story/09000d5d82761060/article/legal-action-in-wake-of-saints-bounty-revelations-not-likely [https://perma.unl.edu/68YG-CVQ2] (providing legal analysis of New Orleans Saints' "bounty" scheme); Lester Munson, *Legal Action Unlikely in Saints' Bounties*, ESPN (Mar. 6, 2012), https://www.espn.com/espn/commentary/story/_/page/munson-120306/new-orleans-saints-bounty-system-unlikely-result-legal-action [https://perma.unl.edu/-T9N3] (additional legal analysis on Saints' "bounty" scheme).

181. David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 599 (2004).

182. *Id.* at 625.

183. *Floyd*, 466 N.W.2d at 923.

184. *Id.*

185. Segoviano v. Hous. Auth., 191 Cal. Rptr. 578, 588 (Cal. Ct. App. 1983).

186. J. Russell VerSteeg, *A Case for a Bill Recognizing Primary Assumption of Risk as Limiting Liability for Persons and Providers Who Take Part in Sports & Recreational Activities*, 36 U. ARK. LITTLE ROCK L. REV. 57, 59–60 (2013).

187. *Id.* at 60.

> [W]hen athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule.[188]

For these state courts, the harm to which an intentionally or recklessly dangerous player subjects another player is unreasonable—even in the context of relatively dangerous contact sports. But if participants and players stick to the "rules," even serious injury or death may just be "part of the game."[189]

Some more established sports purport to offset these risks with appeals to positive virtues like "exercise, teamwork, and skill-building"[190] along with "self-discipline, self-respect, work ethic, determination, and leadership and motivation of others."[191] Even courts have recognized that these attributes make games like flag football "healthy, socially desirable organized recreational activit[ies]," in contrast to "socially undesirable" activities.[192]

The tradeoff between the risk of bodily harm and the benefit of virtue-cultivation factors into cultural assessments of the reasonableness or unreasonableness of recreational activities. For example, for many years, cultural representations of American football emphasized its positive virtues and downplayed its risks. But recent studies have shown how concussions and repeated hits to the head in football lead to chronic traumatic encephalopathy (CTE), which kills brain cells and has been linked to "behavioral and personality changes, memory

188. Nabozny v. Barnhill, 334 N.E.2d 258, 260–61 (Ill. App. Ct. 1975).

189. Some commentators are asking related questions concerning the reasonableness of youth participation in sports which include aspects that are inherently dangerous. *See, e.g.*, Tony Cooper, *Youth Sports—Too Dangerous?/Are Youth Sports Too Harmful?*, SFGATE (Jan. 25, 2012, 10:51 PM), https://www.sfgate.com/health/article/Youth-sports-too-dangerous-Are-youth-sports-2715437.php [https://perma.unl.edu/AL4M-6KNK]; Jon Lackman, *Is It Wrong to Let Children Do Extreme Sports?*, N.Y. TIMES (May 14, 2015), https://www.nytimes.com/2015/05/17/magazine/is-it-wrong-to-let-children-do-extreme-sports.html [https://perma.unl.edu/868L-8WLK]; *Is Sport More Dangerous Than Ever?*, BBC NEWS (July 12, 2015), https://www.bbc.com/news/health-33478629 [https://perma.unl.edu/Z4DG-6SUX].

190. Horton, *supra* note 181, at 653.

191. Jennifer A. Brobst, *Why Public Health Policy Should Redefine Consent to Assault and the Intentional Foul in Gladiator Sports*, 29 J.L. & HEALTH 1, 22 (2015).

192. Segoviano v. Hous. Auth., 191 Cal. Rptr. 578, 587–88 (Cal. Ct. App. 1983).

loss, and speech problems."[193] Risks may be greatest for players who start young.[194]

The greater cultural attention to the risks of football has caused a decline in youth participation. The National Federation of State High School Associations reports that football enrollment has dropped by 6.6% in the last ten years.[195] One Illinois study found that the number of state football players dropped by 14.8% over the last five years.[196] Nobody is seriously suggesting outlawing football, but we might conclude that cultural assessments of football are shifting from viewing it as reasonable to unreasonable.

These cultural assessments are complicated by differences emerging around race and class. The Illinois study on decline of youth football in the state also showed that low-income players began to fill about 25% more of these football rosters.[197] Nationwide, the percentage of white boys playing middle and high school football is dropping as they leave for "safer" sports like baseball or lacrosse; meanwhile, the percentage of Black boys playing football is rising.[198] Some majority-white towns are dropping varsity football programs, while major-

193. Alana Semuels, *The White Flight from Football*, ATLANTIC (Feb. 1, 2019, 5:41 PM), https://www.theatlantic.com/health/archive/2019/02/football-white-flight-racial-divide/581623/ [https://perma.unl.edu/ZA94-PC4T]. In an American Medical Association study, researchers found CTE in 110 out of the 111 brains of former NFL players assessed. Jesse Mez et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 J. AM. MED. ASSOC. 360, 362 (2017), https://jamanetwork.com/journals/jama/fullarticle/2645104 [https://perma.unl.edu/U2MV-GQNH]; *see also* Associated Press, *Ollie Matson Paid Steep Price for Hall of Fame Career*, ESPN (July 29, 2017, 12:04 PM), https://www.espn.com/espn/wire?section=nfl&id=20191751 [https://perma.unl.edu/N8MG-YW3N] (detailing NFL Hall-of-Famer Ollie Matson's struggle with cognitive decline likely due to the CTE found in his brain after his death); Richard Gonzales, *Researcher Says Aaron Hernandez's Brain Showed Signs of Severe CTE*, NPR (Nov. 9, 2017, 9:40 PM), https://www.npr.org/sections/thetwo-way/2017/11/09/563194252/researcher-says-aaron-hernandez-s-brain-showed-signs-of-severe-cte [https://perma.unl.edu/KA83-VALL] (describing the CTE found in Aaron Hernandez's brain after he committed suicide while in prison for murder).

194. A Wake Forest University study found that eight- to thirteen-year-old boys with only one season of tackle football experience had diminished brain function. Semuels, *supra* note 193. A Boston University study found similar results: "Athletes who begin playing tackle football before the age of 12 have . . . three times as much of a risk of clinical depression as athletes who begin playing after 12 . . . ." *Id.*

195. Amanda Morris & Michel Martin, *Poor Students More Likely to Play Football, Despite Brain Injury Concerns*, NPR (Feb. 3, 2019, 4:53 PM), https://www.npr.org/2019/02/03/691081227/poor-students-more-likely-to-play-football-despite-brain-injury-concerns [https://perma.unl.edu/Q28W-QHUZ].

196. *Id.*

197. *Id.*

198. Semuels, *supra* note 193.

ity-Black areas are expanding theirs.[199] And in college, the percentage of NCAA Division I football players who are Black is increasing; the percentage of white players is decreasing.[200]

The racial and class implications factor into reasonableness assessments and raise important questions of agency and choice. As the *Nation* asks: "What's a little permanent brain damage when you're facing a life of debilitating poverty?"[201] Not all families have the "luxury" of worrying about "long-term, sort of abstract damages to these kids."[202] For lower-income families, "playing football is still worth the risk, because they're trying to avoid other dangers."[203] Football—unlike other sports—has a low entry barrier: "[T]here are so many positions that rely on differing capabilities."[204] And football can mean receiving financial aid to an elite private high school or getting a college scholarship (the odds are much better in football than in any other sport).[205] As universities continue to profit considerably from ticket sales, broadcasting fees, licensing, and bowl game payouts,[206] they are offering more football scholarships to expand their programs.[207]

Meanwhile, some wealthier families that no longer allow their children to play football still celebrate "the country's most cherished pastime: watching large men give each other life-threatening concussions . . . as . . . the next generation of Alzheimer's patients and suicide victims ride[s] on to national glory."[208] Upper-class families are pulling their children out of football, but they continue to watch NFL football on Sunday afternoons.[209] Is football a reasonable recreational activity today? It depends.

On the other hand, we no longer allow duels. You and I cannot show up to a field with pistols, walk ten paces, turn around, and fire at

199. *Id.*

200. *Id.*

201. Mychal Denzel Smith, *For Black Boys, the NFL—and Traumatic Brain Injury—Can Be Lottery Tickets*, NATION (Jan. 28, 2013), https://www.thenation.com/article/black-boys-nfl-and-traumatic-brain-injury-can-be-lottery-tickets/.

202. Morris & Martin, *supra* note 195.

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* Chris Smith, *College Football's Most Valuable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018, 9:52 AM), https://www.forbes.com/sites/chrissmith/2018/09/11/college-footballs-most-valuable-teams/#2c1fee946c64 [https://perma.unl.edu/WEM8-PC45] (discussing various colleges' football revenue streams). Texas A&M University has averaged, over the course of three seasons, annual revenues of $148 million per year through its football program. *Id.*

207. *Id.*

208. Smith, *supra* note 201.

209. Semuels, *supra* note 193. They may be watching even *more* football than previously: NFL ratings were up last season. *Id.*

each other.[210] And we cannnot engage in actual gladiator matches. So, dueling and gladiator fights are beyond unreasonable and impermissible—the law does not allow waiver of tort or criminal remedies to engage in these activities. In contrast, football and boxing lie somewhere between reasonable and unreasonable, permitting waiver and assumption of risk within the "normal" course of play. Meanwhile, a host of other recreational activities are apparently reasonable despite their risk of death or serious injury: every year, people die rock climbing (with and without equipment), parachuting, BASE jumping, hang gliding, scuba diving, skiing, snowboarding, bicycling, car racing, flying airplanes, canoeing, swimming, running, and even walking.[211]

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210. Although romanticized in social narratives as a common and somewhat brazen practice, dueling was both regulated and rare at its cultural height. Warren F. Schwartz, Keith Baxter & David Ryan, *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 322 (1984). As a practice, southern dueling was governed by a clear, detailed set of rules—the Wilson Code—which created a negotiation process modeled on principal-agent theory that often resulted in nonlethal resolution. *Id.* at 321–22. This code required the offended and offender to use "seconds," go-between agents who were to be "cool and collected," and seek a nonviolent resolution with each other. JOHN LYDE WILSON, THE CODE OF HONOR; OR RULES FOR THE GOVERNMENT OF PRINCIPALS AND SECONDS IN DUELLING 8 (1838). If nonviolent dispute resolution failed, the Code contained very strict requirements about what fighting positions were permitted, who could and must be present (e.g., a doctor), and which guns could be used. *Id.* at 13–16. These rules—especially those governing firearm selection—reduced the likelihood of fatalities by "increas[ing] the chance of misfire." Schwartz, Baxter & Ryan, *supra*, at 321–23. *Ten Duel Commandments*, from Lin-Manuel Miranda's *Hamilton* musical, tracks the rules contained within the so-called Wilson Code with impressive historical accuracy. LIN-MANUEL MIRANDA, *Ten Duel Commandments*, *on* HAMILTON (Hamilton Uptown, LLC 2015).

211. *Your Chances of Dying Ranked by Sport and Activity*, TETON GRAVITY RES. (July 24, 2019), https://www.tetongravity.com/story/news/your-chances-of-dying-ranked-by-sport-and-activity [https://perma.unl.edu/G2MV-JEAL]. But even this list reveals differences in the risks and perceptions of these activities. Most people would not consider running beyond unreasonable (at least from a risk standpoint), but solo climbing is more controversial. *See* FREE SOLO (National Geographic Documentary Films 2018); Jason Guerrasio, *The Directors of Oscar-Winning Documentary 'Free Solo' Explain Why They Made the Risky Decision to Film Alex Honnold's 3,000 Foot Climb up El Capitan Without a Rope*, BUS. INSIDER (Feb. 25, 2019, 1:27 AM), https://www.businessinsider.com/free-solo-documentary-directors-interview-filming-alex-honnold-el-capitan-climb-without-rope-2018-9 [https://perma.unl.edu/2N23-WC8Y]. Or consider BASE jumping—leaping from Buildings, Antennas, Spans (bridges), or Earth—with only a single parachute while dodging cliffs, buildings, or cables. Cynthia Dizikes, *BASE Jumpers Fall for Thrill-Seeking Lifestyle*, CHI. TRIB. (Apr. 22, 2011), https://www.chicagotribune./news/ct-xpm-2011-04-22-ct-met-basejumping-20110421-story.html [https://perma.unl.edu/9LTX-8BE8]. Because BASE jumpers typically have less than ten seconds between jumping and landing, their first parachute is their only parachute; they do not have time to attempt to deploy a backup. Horton, *supra* note 181, at 622. As of November 24, 2019, 381 BASE jumpers have died from the activity since the BASE jumping community began tracking fatalities in 1981. *BASE Fatality List*, BLINC MAG., https://www.blincmagazine.com/forum/wiki_in

The reasonableness of our play, which factors into the law's baselines for assumption of risk, is not solely a function of risk of harm, and it isn't quite determined by "social value." Rather, the reasonableness of our play appears to rely on a more malleable cultural assessment of the community—or communities—that engage in them as participants, spectators, consumers, and marketers. Underlying these judgments are a complex set of aesthetic preferences, financial incentives, and cultural narratives. And here, as with the way that we punish, people suffer and die within purportedly reasonable activities.

V. CONCLUSION

The previous Part explored the reasonableness lines across four seemingly disparate areas of law: tax policy, criminal punishment, speech restrictions, and tort liability for inherently dangerous sports. The breadth of these applications illustrates the extent to which reasonableness permeates legal inquiries. But it's not just reasonableness—each of these subject matter case studies also included examples of behavior deemed beyond unreasonable: construing pornography as a medical expense, cutting off someone's hand as punishment, and killing someone in a boxing match. And, it turns out, this is true across many other legal categories—we need to account not only for the divide between reasonable and unreasonable but also the additional line of beyond unreasonable. Some actions that are beyond unreasonable are legally impermissible; others remain permissible but still grossly violate our collective norms.

Many of these reasonableness determinations will be contested and viewed differently by different individuals or communities. Sometimes our assessments will shift: a belief or action previously accepted as reasonable will be deemed unreasonable (and, in some cases, a previously legal action will be made illegal). Or conversely, an action once understood as unreasonable or even beyond unreasonable will become accepted as reasonable (and, in some cases, a previously illegal action will be legalized). At the same time, not all of our reasonableness assessments are fully malleable. Legal, political, and cultural judgments about reasonableness sometimes calcify. Every society sets limits to the pluralism it will tolerate, and some of these limits are so entrenched that it would be difficult to conceive of their shifting.

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dex.php?title=BASE_Fatality_List [https://perma.unl.edu/9EXU-YDWA] (last updated June 4, 2020). In addition to the incredibly high risks, BASE jumping does not require substantial skill or affirmative conduct: "BASE jumpers perform one action—pulling their ripcords—during the course of an event that spans a mere ten seconds. Sky diving, by contrast, lasts about seven minutes and requires maneuvering to stay on course. . . . BASE jumping offers little more than *risk itself*." Horton, *supra* note 181, at 627.

The partial malleability and historical contingency of the reasonableness lines might make us question the stability of these lines or tempt us to abandon them as altogether incoherent. But those responses are neither possible nor wise. Even with all of their problems, the reasonableness lines remain important sorting mechanisms within the law. Moreover, contingent but widespread agreement that some actions or beliefs are reasonable, unreasonable, or beyond unreasonable gives us a starting point for naming shared values, which is a prerequisite to naming a political common good.[212]

The line between reasonable and unreasonable can determine what is legal or illegal, or when people are held liable or not liable for their actions. The line between unreasonable and beyond unreasonable can decide who is included within the acceptable boundaries of society: at some point, people who hold beyond unreasonable views may themselves be seen as beyond unreasonable. Most of us do not think this about most people. Most of us can usually separate people from the ideas they hold.

When and whether it is appropriate to collapse the distinction—to cast people and groups outside the boundaries of acceptable society for their beliefs and actions—is a complicated question of social norms and politics. The answer to that question lies beyond the scope of this Article. But the descriptive endeavor on these pages is an important baseline from which to ask the question, particularly given the stakes. Much in the law—and much in political and cultural discourse—depends upon determinations of reasonableness. And while reasonableness remains a useful heuristic, what counts as reasonable or unreasonable is far too often taken for granted. Critiquing and complicating these unreflective assumptions reveals the complicated questions of theory and normativity underlying the social, moral, and dynamic dimensions of reasonableness. We need to question unthinking assertions of what counts as reasonable or unreasonable—including our own.

212. In past work, I have cautioned against conflating "common ground" with "the common good," and I continue to believe that a politically viable common good can only be thinly comprised, akin to something like a "modest unity." INAZU, CONFIDENT PLURALISM, *supra* note 147, at 119–24, 131–33. As Luke Bretherton has noted, attempting to name the common good of a nation as large and diverse as America "denies the plurality and contestability of moral visions in complex societies and the conflicts that arise in pursuit of divergent moral goods, all of which must be negotiated through politics." LUKE BRETHERTON, CHRIST AND THE COMMON LIFE 32–33 n.13 (2019).